

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-1249

RECEIVED
AUG 5 1976
U.S. COURT OF APPEALS
SECOND CIRCUIT

In The
United States Court of Appeals
For The Second Circuit
UNITED STATES OF AMERICA,

B
PQS

Appellee,

vs.

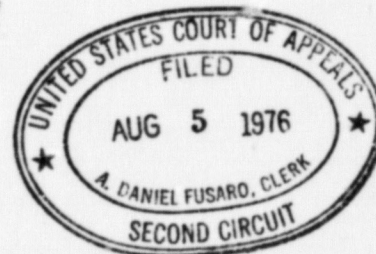
DONALD HEAD, a/k/a "MR. DON",

Defendant-Appellant.

*From a Judgment of Conviction of the United States District
Court, Southern District of New York.*

APPELLANT'S APPENDIX

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Case No. ☐ JUDGE ☒ **0834** Assigned S.
 District No. ☐ **0208** 1
 District No. ☐ **0208** 1

DOCKET ENTRIES

HEAD, DONALD a/k/a "Mr. Don"

Case Filed
Mo. Day
03 25
No. of Dets
06

76

0295

01

JUVENILE

U.S. TITLE/SECTION

OFFENSES CHARGED

ORIGINAL COUNTS

21:846

21:812, 951, 952

21:812, 841

Conspir. to viol. Narco Laws.

Importation to U.S. of Heroin I
Distr. & possess. of Heroin I.

1

4

5

U.S. MAG.
CASE NO.

FBI - RELEASE

☐ AMT ☐ Fugitive
☐ Detained ☐ Pers. Recs.
☐ JPSA
☐ Date ☐ 10% Deposit
☐ Bail Not Made ☐ Surety Bond
☐ Status Changed (See Docket) ☐ Collateral
☐ 3rd ☐ Other

KEY DATES & INTERVALS

ARREST or	INDICTMENT	ARRAIGNMENT	TRIAL
U.S. Court by Began 3-8-76	High Risk Date 3-25-76	1st Filing Final Ples	Trial Set For Voir Dire Trial Began Trial Ended
Summons Served	Indict Waived In Charging District	Indicting Indict Info	NG <input type="checkbox"/> G <input type="checkbox"/> NOL G Ples <input type="checkbox"/> W/Drawn NG <input type="checkbox"/> G <input type="checkbox"/> NOL

SENTENCE
☐ Convicted ☐ On AR Charges
☐ Accused ☐ On Lesser Offenses
☐ Dismissed ☐ WCP ☐ WP
☐ On Supervision

MAGISTRATE		DATE	INITIAL/NO	INITIAL APPEARANCE DATE	INITIAL/NO	OUTCOME
Search Warrant	Issued			Preliminary Examination		HELD FOR GOV'T OR PROSECUTOR'S OFFICE
Return				OR		HELD FOR GOV'T OR PROSECUTOR'S OFFICE
Removal	Issued			Removal Hearing		HELD FOR GOV'T OR PROSECUTOR'S OFFICE
Warrant Return				Waived		HELD FOR GOV'T OR PROSECUTOR'S OFFICE
Offense				Not Waived		HELD FOR GOV'T OR PROSECUTOR'S OFFICE
On Complaint				Intervening Party		HELD FOR GOV'T OR PROSECUTOR'S OFFICE

U.S. Attorney or Asst.

ATTORNEYS

Defendant ☐ A ☐ Ret ☐ Waived ☐ Set ☐ None ☐ Other

Federico E. Virella, Jr.
 791-1984

Head, et al.

DATE DOCUMENT NO. PROCEEDINGS

3-25-76 Filed indictment.

4-5-76 Deft. Atty. present, pleads not guilty. Bail fixed by Mag. cont'd \$25,000 cash or surety. Deft Cont'd remanded in lieu of bail. Assigned to MacMahon, J...Lasker, J.

4-12-76 Filed Notice of Appearance for def't - Irving G. Perl - 60 E. 42nd St., New York, N.Y. 10017 - Tel. #682-6360

4-28-76 Filed Opinion #44318 & Order. Def't Head moves orally for disclosure of a list of all witnesses the Gov't intends to call during the trial & the identity of an informant used in the investigation of the conspiracy to import heroin. For the reasons indicated, the motion of def't Head is denied.
 MAC MAHON, J. n/m

4-30-76 Filed Envelope sealed by Court 4-30-76. Order signed by MAC MAHON, J. (Placed in Vault in Cashier's Office)

Docket Entries

APPLICABLE DOCKET ENTRIES SHOW IN SECTION V, ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

IV. PROCEEDINGS (continued)

PAGE TWO

V. EXCLUDABLE DELAY

Interval
Section 11
(1)

Excluded
Pre-Jury
(2)

Excluded
Post-Jury
(3)

(DOCUMENT NO.)

Def't (Att'y Robert Florsheim) present. Def't Wheaton severed from case, Att'y Abraham Solomon ill. Suppression hearing begun on Counts 1, 4 & 5 only. Def't Head motion to suppress - Denied without prejudice to renewal at conclusion of trial. Jury empanelled & sworn - Trial begun. Trial continued - (Att'y Irving Perl for def't present) Trial continued. Trial continued. Trial continued & concluded. Jury verdict. Def't Donald Head Guilty on each of Counts 1-4-5. PSI ordered. Sentence May 24, 1976 at 10 A.M. Bail increased to \$100,000, cash/surety. Def't continued remanded in lieu of increased bail. (Motion to suppress - Denied.....MAC MAHON, J.)

(Filed in Court 5-3-76) Filed Govt's memo that def't's motions to suppress certain evidence should be denied.

(Filed in Court 5-3-76) Govt's request for the voir dire.

FILED JUDGMENT & COMMITMENT ORDER= Def't (Irving G. Perl present) Def't guilty & is committed to the custody of the Att'y Gen. for imprisonment for a period of FIFTEEN (15) YEARS & THREE (3) YEARS SPECIAL PAROLE on each of Counts 1, 4 & 5, the sentences to run concurrently with each other.....MAC MAHON, J. (Advised of right to appeal)

Filed notice of appeal by def't to the USCA from the Judgment & Order denying suppression, ent. 5-24-76. Copies sent to Robert B. Fiske, Jr., U.S. Attorney, 1 St. Andrews Plaza, New York, N.Y., 10007, (Frederico E. Virella, Jr.), & Donald Head, Metropolitan Corr. Center, New York, N.Y. 10007.

Filed Magistrate's Temporary Commitment - Military detainer.

Filed transcript of record of proceedings, dated April 6, 1976

Filed transcript of record of proceedings, dated April 29, 1976

Filed transcript of proceedings dated May 24, 1976

Filed transcript of proceedings dated May 4, 5, 6, 7, 1976

FINE AND RESTITUTION PAYMENTS

DATE	RECEIPT NUMBER	DATE	RECEIPT NUMBER	G.D. NUMBER

INDICTMENT (Filed March 25, 1976)

3a

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
UNITED STATES OF AMERICA,

- v -

DONALD HEAD, a/k/a "Mr. Don",
BRUCE WHEATON,
BOONTHEM PETKAMNERD,
BOONSACK PHUVASITKUL, a/k/a "Sammy",
MANOP SAIPHANTONG, and
PERM PETKAMNERD,

Defendants.

INDICTMENT

76 Cr. 295

-----X
The Grand Jury charges:

1. From on or about the 1st day of September, 1975 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, DONALD HEAD, a/k/a "Mr. Don", BRUCE WHEATON, BOONTHEM PETKAMNERD, BOONSACK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG, and PERM PETKAMNERD the defendants and others to the Grand Jury unknown, unlawfully, intentionally and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1), 841(b)(1)(A), 952(a), 959, 960(a)(1), 960(a)(3) and 960(b)(1) of Title 21, United States Code.

2. It was part of said conspiracy that the said defendants and others unknown unlawfully, intentionally and knowingly would manufacture and distribute large amounts of heroin, a Schedule I narcotic drug controlled substance, in Thailand and elsewhere intending and knowing that the said heroin would be unlawfully imported into the United States, in violation of Sections 812, 959, 960(a)(3) and

960(b)(1) of Title 21, United States Code.

3. It was further part of said conspiracy that the said defendants and others unknown to the Grand Jury, unlawfully, intentionally and knowingly would import into the United States from places outside thereof, to wit, Thailand, quantities of heroin, a Schedule I narcotic drug controlled substance, the exact amount being unknown to the Grand Jury, in violation of Sections 812, 952(a), 960(a)(1) and 960(b)(1) of Title 21, United States Code.

4. It was further part of said conspiracy that the said defendants unlawfully, intentionally and knowingly would distribute and possess with intent to distribute heroin, a Schedule I narcotic drug controlled substance, the exact amount thereof being to the Grand Jury unknown in violation of Section 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.

THE MEANS USED BY THE DEFENDANTS TO
ACCOMPLISH THE OBJECTS OF THE CONSPIRACY

5. Among the means whereby the defendants and others unknown to the Grand Jury would and did carry out the objects of said conspiracy, and insure the success of the unlawful venture to import, buy, sell and distribute heroin for profit, were the following:

(a) The defendants BOONTERM PETKAMNERD, .
MANOP SAIPHANTONG and PERM PETKAMNERD were Thai nationals who served as sources of supply for multi-kilogram quantities of pure heroin to be shipped by their co-conspirators to the United States.

(b) The defendant DONALD HEAD, a/k/a

"Mr. Don", is and was at all times relevant to this Indictment a Staff Sergeant in the United States Air Force assigned to the United States Air Mail Military Terminal, Air Force Post Office, located at Don Muang, Thailand as a postal shift supervisor. Using this official position, the defendant DONALD HEAD, a/k/a "Mr. Don", would and did use the United States Military postal system to mail large quantities of heroin into the United States.

(c) Upon arrival in the United States, the heroin was purchased and re-distributed by the defendants BRUCE WHEATON and BOONSAK PHUVASITKUL, a/k/a "Sammy".

OVERT ACTS

In pursuance of the said conspiracy and to effect the objects thereof, the following overt acts were committed in the Southern District of New York and elsewhere:

1. In or about September, 1975, the defendants BOONSAK PHUVASITKUL, a/k/a "Sammy", and MANOP SAIPHANTONG had a conversation in Bangkok, Thailand.
2. In or about December, 1975, the defendants BOONTHERM PETKAMHERD, BOONSAK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG, and PERM PETKAMHERD met in a coffee shop located in Bangkok, Thailand where they had a conversation regarding the importation of heroin from Thailand into New York, New York.
3. In or about February 4, 1976, the defendants DONALD HEAD, a/k/a "Mr. Don", BOONTHERM PETKAMHERD, BOONSAK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG and PERM PETKAMHERD met in an apartment house located at Soi 13 in Bangkok, Thailand where they discussed the mailing of approximately 700 grams of heroin into New York, New York from Bangkok, Thailand.

COUNT TWO

68

The Grand Jury further charges:

On or about the 18th day of April, 1975 in the Southern District of New York, BOONSAK PHUVASITKUL, a/k/a "Sammy" the defendant, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 101 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

COUNT THREE

The Grand Jury further charges:

In or before February, 1976, in Thailand and elsewhere, BOONTORN PETKAMNERD, MANOP SAIPHANTONG, and PERM PETKAMNERD, the defendants, unlawfully, intentionally and knowingly did manufacture and distribute and caused to be manufactured and distributed a Schedule I narcotic drug controlled substance to wit, unknown amounts of heroin hydrochloride, intending and knowing that such substance would be unlawfully imported into the United States.

(Title 21, United States Code, 812, 959, 960(a)(3), and 960(b)(1); Title 18 United States Code, Section 2.)

COUNT FOUR

The Grand Jury further charges:

On or about the 23rd day of February 1976, in the Southern District of New York, DONALD BEAD, a/k/a "Mr. Don", BRUCE WHEATON, BOONTORN PETKAMNERD, BOONSAK PHUVASITKUL, a/k/a "Sammy", MANOP SAIPHANTONG, and PERM PETKAMNERD, the defendants, unlawfully, intentionally and knowingly did import and caused to be imported into the customs territory of and into the United States, to wit, New York, New York, from a place outside thereof, Bangkok, Thailand a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 951, and 952(a); and Title 18, United States Code Section 2.)

COUNT FIVE

7a

The Grand Jury further charges:

On or about the 23rd day of February, 1976 in the Southern District of New York, DONALD HEAD, a/k/a "Mr. Don", BOONTERM PETKAMNERD, BOORSAK PHUVASITKUL, a/k/a "Sammy", BRUCE WHEATON, MANOP SAIPHANTONG, and PERM PETKAMNERD, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride.

(Title 21, United States Code, Sections 812, 841(a)(1) and 841(b)(1)(A), and Title 18, United States Code, Section 2.)

FOREMAN

ROBERT B. FISKE, JR.
United States Attorney

EXCERPTS OF MINUTES BEFORE MAC MAHON, U.S.D.J. ON
SUPPRESSION HEARING MAY 3, 1976

8a

1 jwbr

Roberts-direct

39

2 who are more qualified on the machine than I am, use it more
3 frequently. All of us were of the opinion that it contained
4 currency.

5 THE COURT: Then what did you do with the package?

6 THE WITNESS: We then put the package back
7 into the unit mail clerk's possession for delivery to
8 Sergeant Head.

9 Q Sir, did you have any particular search warrant
10 in your possession on the 9th of March or on the 10th of
11 March when you fluoroscoped that particular package that you
12 are now holding in your hand for the first time?

13 A No. A warrant is not required for contraband.

14 Q Do you know whether a warrant is required for
15 first class mail to open it, search it?

16 A To open first class mail, yes.

17 THE COURT: Was this first class mail?

18 THE WITNESS: Yes, it is registered mail.

19 THE COURT: Do you have a regulation for or
20 law that permits you to fluoroscope first class mail?

21 A Yes, USAF Postal Service Manual 182-3 gives
22 me the authority to fluoroscope both in and outbound first
23 class mail.

24 THE COURT: Can I have that regulation?

25 MR. VIRELLA: Yes, your Honor. It is hearing

1 jwbr Roberts-direct 43

2 particular piece of paper I have in my hand. Would you
3 describe that to the Court, please?

4 THE COURT: Sustained.

5 Q Officer, is U.S. currency in bill denominations
6 contraband?

7 THE COURT: Sustained.

8 MR. FLORSHEIM: Your Honor, I think this is a
9 very germane point.

10 THE COURT: It may be germane, but it is a legal
11 question.

12 MR. FLORSHEIM: I understand, your Honor, it is
13 within your province. But I wanted to know if there is
14 something different in the Air Force Manual.

15 THE COURT: Put the question so I know what
16 you are talking about, is currency contraband in the Air
17 Force Manual?

18 Q Answer his Honor's question, if you know.

19 A To my knowledge, no.

20 THE COURT: You mean as far as you know, is
21 that what you mean, to your knowledge?

22 THE WITNESS: Yes.

23 MR. FLORSHEIM: May I have one moment,
24 if your Honor please.

25 (Pause.)

* * *

1 7 mcsr

Roberts - cross

2 A We do not open any first class or priority
3 rated parcels. We do open some second, third and fourth
4 class parcels.

5 Q At the time you saw Government Exhibit 15,
6 which is the package, what classification was the parcel?

7 A It is registered mail and therefore we are
8 prohibited from opening it.

9 THE COURT: Is it a first class parcel; is that
10 the way you describe it?

11 THE WITNESS: Actually it is an air parcel,
12 slightly higher than a first class parcel.

13 Q And you do not open those parcels at all?

14 A We are prohibited from opening this kind
15 without a search warrant.

16 THE COURT: Do you inspect them routinely?

17 THE WITNESS: We may inspect them in the
18 fluoroscope machine, yes, sir.

19 Q Is this contraband program where you routinely
20 inspect these types of parcels related to the flow of
21 heroin and money back and forth from Thailand to the
22 United States?

23 MR. FLORSHEIM: I object to that question
24 unless the officer is going to testify to what he has
25 known.

* * *

1 jwbr 3

Kerr-direct

2 THE COURT: Do you want to clarify his changing
3 his story?

4 MR. FLORSHEIM: I want to clarify what I recall
5 his testimony was in this case.

6 THE COURT: Look, his testimony is down there.

7 Q Officer, when did you receive the warrant?

8 A I am sorry?

9 Q When did you receive the warrant?

10 A As I said before, I received it in the mail
11 serveral days following.

12 Q That was what, March 29th?

13 A No, it was before that, but I am not sure
14 exactly what the date was. Approximately a week later.

15 Q You didn't have the warrant when you placed him
16 under arrest and made the search, is that right?

17 A That is right.

18 THE COURT: But you were advised it was
19 issued?

20 THE WITNESS: Yes, sir.

21 Q What time were you advised the warrant was
22 issued?

23 A When I returned to my office in Bangkok,
24 approximately 5:15.

25 Q Who advised you?

1 jwbr

2 A Mr. Charles Johnson of my office

3 Q What time, sir, was the search made of the
4 package, if you know?5 A Approximately 5:30 in the evening, or
6 6 o'clock. I am not exactly sure. Approximately that.7 Q Did you request Mr. Oak to get a search war-
8 rant?

9 A Yes, sir.

10 Q And this was after you placed the defendant under
11 arrest, is that right?

12 A I didn't place him under arrest.

13 Q Someone place him under arrest in your pre-
14 sence, is that right?

15 A That is correct.

16 Q It was after that person placed him under arrest
17 that you asked for the search warrant, is that right?

18 A Yes, sir.

19 Q Was that the first arrest you made?

20 THE COURT: Sustained.

21 Q How many arrests did you make while you were
22 in the service?23 THE COURT: Sustained. I don't care if he never
24 made one before. It is of no moment. It is immaterial.

25 Q Was there a crime committed in your presence

1 18 mcsr

Mahe - cross

2 CROSS-EXAMINATION

3 BY MR. VIRELLA:

4 Q Agent Maher, directing your attention to March
5 11, 1976 and specifically at the time of Sergeant Head's
6 arrest, were you aware of the complaint that had been
7 issued by the Southern District Court's Magistrate?

8 A Yes, sir, I was.

9 Q When did you first become aware of that?

10 A Sometime earlier that morning. I don't recall
11 what time it was.

12 Q Did you know where Sergeant Head was located
13 at this time?

14 A Yes, sir, I did.

15 Q Where was that?

16 A We believe it was at his residence, Insaf
17 Mansion, Soi 13, Bangkok.

18 Q Were you also aware that he was stationed at
19 another hotel before his departure from Thailand?

20 A No, sir, we were not.

21 Q You saw Sergeant Head on the 11th; is that
22 correct?

23 A Yes, sir.

24 Q At the time of his arrest you testified that
25 you saw the package when you unzipped the bag; is that

* * *

129

1 jwbr

2 THE COURT: Why isn't it a search?

3 MR. VIRELLA: Because he had no possessory
4 interest.

5 THE COURT: Why isn't it a search?

6 MR. VIRELLA: Because it is --

7 THE COURT: How can you open it and see what's
8 in it?9 MR. VIRELLA: We could concede it would be a
10 search, your Honor. However, he had no possessory or
11 proprietary interest.12 THE COURT: Are you saying he doesn't have
13 standing?

14 MR. VIRELLA: Exactly, your Honor.

15 THE COURT: Why doesn't he? It is going to
16 be use against him. Isn't that enough to give him standing?17 MR. VIRELLA: At the particular time it was
18 fluoroscoped, no, but when he obtained it he had a particular
19 interest. However, the attachment of that particular right
20 at the time the package was fluoroscoped, we would argue, your
21 Honor, that he did lack standing.22 THE COURT: Well, I think you better argue this
23 in an adequate brief which I haven't got now.24 I deny the motion to suppress without prejudice
25 to renewal should it be necessary following the jury's

* * *

EXCERPTS OF TRIAL TRANSCRIPT BEFORE MAC MAHON
U.S.D.J ON MAY 4, 1976

* * *

1 jwb-11

Phuvastikul-direct

2 whatever it is on it. I haven't heard any limit to the
3 offer.

4 MR. PERL: Your Honor, I would ask it be
5 limited solely with regard to the person named Mr. Wheaton.
6 I know of nobody named Yupin Hill mentioned anywhere in
7 this matter.

8 THE COURT: Overruled.

9 (Government Exhibit 3 was received in
10 evidence.)

11 Q Mr. Phuvastikul, at the time Boonterm gave you
12 that piece of paper, did you have a conversation with him?

13 A Yes, sir.

14 Q Can you tell us what he said to you and what you
15 said to him?

16 A After he gave me the piece of paper, he said
17 you came in New York, you go to see Bruce Wheaton in this
18 address because Bruce Wheaton owe about \$20,000.
19 By that time Mr. Boonterm give him his ID card, too, he say,
20 "When you see Bruce give him the ID card me, Boonterm."

21 Q I show you what has been marked Government
22 Exhibit 4 for identification and ask you if you can identify
23 it?

24 A Yes, sir.

25 Q Look at the jury. Can you tell us what it is?

xxx

jwb-12

Phuvastikul-direct

A This is the Boonterm ID card, sir.

Q Is that the ID card that Boonterm gave you at that time?

A Yes, sir.

MR. VIRELLA: Your Honor, we offer Government Exhibit 4 for identification into evidence.

MR. PERL: May we approach the bench?

THE COURT: Surely.

(At the bench.)

MR. PERL: I object to this insofar as it relates to a conversation that Mr. Wheaton told Mr. Boonterm about \$20,000. I don't see it in this indictment. I submit to the Court it is prejudicial in front of the jury. I think it is clearly without the scope of what the Government is seeking to allege transpired between Mr. Head and these other gentlemen and Mr. Wheaton. This is a hearsay declaration by Mr. Boonterm and clearly outside the scope of the matters before the Court.

THE COURT: Yes, I think the part of the conversation to the extent that he owes us twenty odd thousand dollars, whatever it is --

MR. VIRELLA: Your Honor, there will be evidence later on during the trial, your Honor, of the conversation that was taped between Mr. Phuvastikul and Head in which

1 jwb-13

Phuvastikul-direct

2 Mr. Head was saying that Bruce Wheaton had been in Bangkok
3 the latter part of February and the early part of March
4 and Head met with Boonterm and they had talked about
5 their difficulties, their financial problems. This was
6 simply another act in furtherance of the conspiracy.

7 This is as to his knowing Mr. Wheaton and the
8 establishment of their relationship.

9 MR. PERL: Your Honor, I don't see that the
10 relationship between Mr. Head and Mr. Wheaton has anything
11 to do with an antecedent event.

12 THE COURT: It is a continuing conspiracy.
13 I will allow it. I will let it stand.

14 MR. PERL: May we have a frame of reference?
15 Was this supposed to have been within September 1975 and
16 forward?

17 THE COURT: February.

18 MR. PERL: There is no foundation as to when
19 this debt supposedly arose and how it arose.

20 THE COURT: There doesn't have to be. It is part
21 of the conversation.

22 Go ahead.

23 Overruled.

24 MR. PERL: I just don't understand its relevance,
25 your Honor, to this particular conspiracy.

jwb-1

Phuvastikul-direct

244

Q Did you tell him that the package would be received in New York?

A Yes.

Q Is there anything else that you talked about at that meeting?

A He told me about Bruce Wheaton.

Q Can you tell us what he said?

A Yes, he said Bruce Wheaton went to Bangkok with his sister now. And Bruce Wheaton went to see Boonterm at Rayong.

Q Where is Rayong?

A (Through the interpreter) Rayong is a province of Thailand.

Q Do you know where Boonterm lives in the province of Rayong?

A (Through interpreter) He is living in Utapao.

Q Was there anything else said in that conversation?

A Yes, he said Bruce Wheaton now coming to Thailand stay at the Chavalit Hotel and Bruce Wheaton come to buy the merchandise from Boonterm and give to Mr. Don to mailing for him.

MR. PERL: I object and ask that be stricken.

THE COURT: Could you read the answer back. I had trouble understanding.

1 jwb-2

Phuvastikul-direct

2 (Record read.)

3 THE COURT: Overruled.

4 Q After this conversation with Manop did
5 you obtain an airplane ticket?

6 A (Through interpreter) Yes.

7 Q Where did you pick it up?

8 A At the Pan American office at Siam Center.

9 Q I show you what has been marked as Government
10 Exhibit 6 for identification and ask you if you can identify
11 it?

12 A Yes, sir.

13 Q Can you tell us what it is?

14 A This is the airplane ticket.

15 Q That you purchased?

16 A (Through interpreter) Yes.

17 Q Did you pay for that with your own money or
18 was it already waiting for you?

19 A It was already waiting for me at the office,
20 sir.

21 MR. VIRELLA: Your Honor, we offer Government
22 Exhibit 6 for identification into evidence.

23 VOIR DIRE EXAMINATION

24 BY MR. PERL:

25 Q Mr. Boon -- I am sorry, I have trouble with

* * *

1 jwb -10

Phuvastikul-direct

2 a conversation with Manop?

3 A Yes, sir.

4 Q Did you recognize his voice on the phone?

5 A Yes, sir.

6 Q Can you tell us what you said to him and what
7 he said to you during that conversation?8 A I talk to him, says I am in Frankfurt now. And
9 I be calling him again when I get to New York, but by
10 the time Mr. Manop told me Bruce Wheaton --

11 Q Sorry?

12 A Bruce Wheaton just left from Bangkok and he got
13 two or three unit merchandise to give it to Mr. Don to
14 mail it.

15 Q I show you what has been marked --

16 MR. PERL: I object to that and move to strike
17 it. I think this is hearsay upoh hearsay, your Honor.

18 THE COURT: Overruled.

19 Q I show you what has been marked as Government
20 Exhibit 9 for identification and askyou if you can identify
21 it.

22 A Yes, sir.

23 Q Can you tell us what it is?

24 A This is the receipt of the hotel, sir.

25 Q Which hotel?

* * *

jwb-21

Phuvastikul-direct

1
2 THE COURT: Lead him, Mr. Virella, we will be
3 here forever and ever and ever.

4 Q In return for your cooperation, did the Govern-
5 ment tell you that it would tell the sentencing Judge about
6 your cooperation in this case?

7 A (Through the interpreter) Yes.

8 Q And did it also tell you at the time of
9 sentencing that he would dismiss the other charges in
10 the indictment that are pending against you?

11 A Yes, sir.

12 Q I show you 3505 and ask you if you can identify
13 it.

14 THE COURT: I ask you if that is the agreement?

15 THE WITNESS: Yes.

16 Q Mr. Phuvastikul, had you been arrested prior to
17 your present arrest?

18 A (Through the interpreter) Never.

19 Q In your entire life, never?

20 A No, sir.

21 MR. VIRELLA: Your Honor, we have no further
22 questions.

23 THE COURT: We will take a very short recess.)

24 (Recess.)

/4/76

1 1 jwmch

Phuvasitkul-cross

2 (Jury present)

3 THE COURT: All right, cross-examine.

4 CROSS-EXAMINATION

5 BY MR. PERL:

6 Q When you say that you decided to cooperate
7 and there was an agreement made, were you advised --

8 MR. PERL: Strike that.

9 Q -- was there a date set for your sentencing,
10 sir?

11 A (Through the interpreter) Yes.

12 THE COURT: May I suggest that when you cross-
13 examine you put leading questions? It will save you an awful
14 lot of time.

15 MR. PERL: I didn't hear, your Honor.

16 THE COURT: I said, put leading questions.

17 It will save a lot of time. You are on cross-examination.

18 Q What is the date of your sentencing?

19 A (Through interpreter) May 27th.

20 Q May 27th.

21 And do you know who the judge is that you
22 will be going before for your sentence?

23 THE COURT: Please lead him.

24 "You are going before Judge MacMahon, aren't
25 you?"

1 2 jwmch

Phuvasitkul-cross

2 Lead.

3 Q Are you going to be sentenced by Judge MacMahon?

4 A Yes.

5 Q You were arrested on March 9, 1976; is that
6 correct?

7 A Yes.

8 Q And you then decided to cooperate from that
9 point on.

10 You stated on direct examination that you saw
11 Manop about the end of September and he advised you that
12 he was going to see Mr. Boonterm who said he had
13 merchandise in Thailand.

14 MR. VIRELLA: I object to the mischaracterization
15 of the testimony. There were two meetings in September,
16 your Honor.

17 THE COURT: Please, let the witness testify.
18 Let's hear the question.

19 Q During the month of September, did you have
20 conversations with Manop with regard to importing drugs
21 into this country?

22 A Yes.

23 Q And what were the dates -- was there one
24 conversation or more than one conversation?

25 A (Through interpreter) Many time.

jwb

Taylor-direct

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identity card for the man he called Boonterm.

Q I show you Government Exhibit 3 in evidence and 4 in evidence, and ask you if you can identify those?

A Yes, Government Exhibit 3 is Bruce Wheaton's name and address and this is the name and address that Mr. Phuvastikul showed us -- showed Agent Fenrich and myself in Toronto on March 7th.

And this is the identification card.

Q You are referring to Exhibit 4 in evidence?

A That is correct. This is the identification card he showed us and told us that this was -- the man named Boonterm had given him this to show to Wheaton as -- so that Wheaton would know that the man was coming directly from Boonterm.

Q Now, was there anything else discussed at the meeting that you can remember?

A The only -- we discussed further shipments of heroin to the United States and that -- one of the things -- Phuvastikul did say that Don, the man Don, had heroin already in San Francisco and that the heroin was there awaiting his arrival back in the United States and once this man named Don came back to the United States, we would probably be able to buy the heroin already in San Francisco from him.

MR. PERL: I move to strike that, your Honor.

1 jwb Taylor-direct 290

2 It is completely without the realm -- it is hearsay with
3 regard to Mr. Phuvastikul and ask the jury to disregard
4 that.

5 THE COURT: Read the question and answer, please.

6 (Record read.)

7 THE COURT: Overruled.

8 Q Now, Agent Taylor, after this meeting, when
9 was the next time you saw Phuvastikul?

10 A On the next day.

11 Q Where did you see him?

12 A At the Lord Simcoe Hotel again in Toronto.

13 Q Did there come a time when you went to New York?

14 A Flew to New York, yes, that same afternoon on
15 March 8th, Phuvastikul and myself and Agent Fenrich flew
16 to New York.

17 Q What happened when you arrived in New York

18 A We went directly from the airport to the Plaza
19 Hotel on 58th Street and Fifth Avenue where we met with another
20 agent, John Coleman, in the oyster bar at the Plaza Hotel.

21 Q At that time did you have a conversation?

22 A Yes, I did.

23 Q And -- well, who was present at the oyster bar?

24 A Agent Fenrich, Group Supervisor John Coleman, myself
25 and Boonzak Phuvastikul.

* * *

jwb

Taylor-direct

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2 A Yes, it was.

3 Q Who made the telephone call?

4 A Phuvastikul.

5 Q After the telephone call was terminated what
6 if anything did you do?

7 A I removed the tape recorder -- the cassette
8 tape and I initialed it and dated it.

9 Q And this is the cassette that was being run while
10 the telephone conversation took place?

11 A Yes, right, recording that conversation.

12 Q I show you what has been marked as Government
13 Exhibit 67 in evidence, and ask you if you can identify it.

14 A Yes, I can, my initials appear on it along with
15 the date, March 23, 1976. It is the tape recording that
16 Phuvastikul had on that date.

17 Q Prior to March 23, specifically on March 19
18 this year, were you on duty that day?

19 A Yes, I was.

20 Q Can you tell us, what did you do on that date?

21 A I obtained a search warrant for a letter in this
22 courthouse and served that search warrant on the United
23 States postal inspection service at 90 Church Street in
24 Manhattan.
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Q Did you obtain a letter that date?

A Yes, I did.

Q Mr.Taylor, I show you what has been marked Government Exhibit 17 for identification and 18 for identification and ask you if you can identify them.

A Yes, Government Exhibit 17 is the envelope in which Government Exhibit 18 was contained. These are the two things that were seized by me with a search warrant on March 19, 1976.

MR. VIRELLA: Your Honor, we would offer Government Exhibits 17 and 18 into evidence.

MR. PERL: Your Honor, I would object to the receipt of these, 17 and 18 marked for identification, based on the fact -- may I just ask Mr.Taylor.

VOIR DIRE EXAMINATION

BY MR.PERLE:

Q Mr.Taylor, do you know who in fact wrote this letter?

MR. VIRELLA: Objection.

THE COURT: Sustained.

Q Did you take this letter pursuant to the search warrant?

A Yes, I did.

Q Had you ever seen it before you seized it with

1 jwb

Taylor-direct

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2 that there is no mention of Mr. Head in there, there is
3 no showing that that has anything to do within the purview
4 of this indictment.

5 THE COURT: Overruled.

6 (Government Exhibits 17 and 18 were received
7 in evidence.)

8 BY MR. VIRELLA:

9 Q Agent Taylor, how long have you been an agent?

10 A Approximately seven years.

11 Q During the span of seven years have you made
12 any undercover purchases of narcotics?

13 A Yes, I have.

14 Q Were these different types of drugs?

15 A Yes.

16 Q And about how many purchases have you made doing
17 undercover work? A guess.

18 A Fifty -- about 50.

19 Q Are you familiar with the current prices of
20 heroin in the streets of New York?

21 A Yes, I am.

22 Q What was the price of the pound and a half of
23 heroin that you were purchasing from Mr. Phuvastikul?

24 A I had agreed to pay \$35,000 for it.

25 Q Assuming that the pound and a half of heroin was

* * *

1 18 jwmch

Phuvasitkul-cross

2 A Yes, sir.

3 Q Did you make that statement without knowing
4 where it was being sent?5 A (Through interpreter) At that time there
6 was this discussion that I have with Manop. It was the
7 understanding that if the first 700 units arrive here
8 and the deal completed, all right, there will be further
9 merchandise which is on the way or is already here,
10 I am not sure, that they can get in touch and get rid or
11 sell it here.

12 MR. PERL: May I move to strike that?

13 THE COURT: No. I think it's responsive.
14 Proceed.

15 MR. PERL: Okay.

16 Q • What merchandise was on the way? Specifically,
17 what merchandise, to whom, to where?18 A (Through interpreter) The reason I say mer-
19 chandise on the way is because --

20 Q Mr. Boonsak --

21 THE COURT: We will take a short recess.

22 You study how to frame your questions. Frame it.

23 I don't think it's framed so the witness can understand
24 you.

25 THE COURT: I think I am framing it, your

1 19 jwmch Phuvasitkul-cross

2 Honor, as clearly as I possibly can.

3 THE COURT: Well, try harder.

4 (Recess)

5 (Continued on next page)

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1 6 wcsr Phuvasit Kul - cross
2 understand, sir.

3 Q A few minutes ago you told me that this conver-
4 sation of February 11th refers to the shipment to the Louis
5 Kramer.

6 A [Through interpreter:] Yes.

7 Q Do you recall saying on Page 3, "Yes, that's
8 why I want to talk to you. You see. I'll tell you how to
9 pick up the merchandise, it's very safe, you know"?

10 Now, sir, if it is going to the Louis Kramer
11 box, what do you have to tell Mr. Taylor about picking it
12 up?

13 A [Through interpreter:] The reason that I
14 mentioned that it is safe, you know, I mean that they are
15 mailed to the United Air Force Postal Office.

16 Q What is he going to tell Mr. Taylor specifically
17 about how to pick it up?

18 A [Through interpreter:] That referred to further
19 merchandise which I have mentioned earlier, that we
20 understand Don already had it here.

21 Q Mr. Boonsak, did you tell me two or three or
22 five minutes ago this conversation was --

23 THE COURT: Sustained, sustained. Save your
24 arguments. There is a time for that.

25 Q Does this conversation of February 11th refer

* * *

1 17 wcsr Phuvasit Kul - cross

2 told me, he told me that Don had told him that he have
3 that merchandise to mail here or to bring it here, and
4 the first stop will be San Francisco.

5 Q Mr. Boonsak, you previously told us, you made
6 statements, your statements that it is on the way, it is
7 on the way, meant that merchandise had been mailed by Mr.
8 Head to San Francisco. Is that true or is that not true?

9 A [Through interpreter:] I guess that is the
10 same merchandise, because that is what he told me.

11 It's the same, similar conversation I had with
12 Manop, and that was also recorded in one of the tapes:
13 that what we actually did was, we tried to get the first
14 deal through, and then I have to call back from time to
15 time to find out what's going on and to develop the
16 further business.

17 Q Mr. Boonsak, very simply: Was the merchandise
18 in San Francisco or was it not?

19 A [Through interpreter:] As I have explained
20 to you and I have answered you earlier --

21 MR. PERL: Excuse me, Mr. Interpreter. I
22 would move to strike the answer as unresponsive. I have
23 asked for a yes-or-no answer. If the witness is incapable
24 of answering, he should say so.

25 THE COURT: Denied.

1 18 wcsr

Phuvasit Kul - cross

2 Go ahead, answer it, Mr. Interpreter.

3 A [Through interpreter:] As I have answered
4 your question earlier, I was told by all this thing. I
5 can't tell you the full details in yes or no. They told
6 me that whenever the first deal is concluded, I have to
7 call back and find out all the activities going on from
8 time to time. I cannot answer you with this kind of
9 question.

10 Q Are you telling me, Mr. Boonsak, that any
11 information you said you gave to Mr. Taylor was only
12 based on what Mr. Manop told you?

13 MR. VIRELLA: Objection.

14 A [Through interpreter:] All the details and
15 all the discussion I had with Mr. Taylor, that is what
16 Manop told me. Manop told me, we discuss about it, and I
17 tell -- he ask me to tell it to Mr. Taylor.

18 Q And he asked Mr. Boonsak to tell it to Mr. Taylor.

19 THE COURT: Yes, That was the answer. Next
20 question.

21 MR. PERL: All right, sir.

22 THE COURT: We don't need echoes back there.

23 MR. PERL: Well, I just want to make sure I
24 heard it.

25 THE COURT: Please.

1 19 wcsr

Phuvasit Kul - cross

2 Q Mr. Boonsak, further down, do you remember
3 saying to Mr. Taylor, "Oh, he did not know, nothing. I
4 just, I just pay him two thousand five hundred dollars for
5 to mail that parcel, that's all.

6 "Taylor: You pay him two thousand five-hundred
7 dollars?"

8 Whom were you talking about, Mr. Boonsak?

9 A [Through interpreter:] According to what I have
10 testified earlier, that every time Manop told me that
11 every time they asked Don to mail for them, they asked for
12 25,000 baht -- \$2,500, for each packet mailed .

13 Q Mr. Boonsak said --

14 MR. VIRELLA: Objection. He has not finished
15 his answer, your Honor.

16 THE COURT: Yes, let him finish. Don't be
17 impatient.

18 MR. PERL: Sorry.

19 A [Through interpreter:] But it was this time
20 that we talk about the mailing of the 700 grams that he,
21 instead of taking the money, he wanted one unit.

22 And being the reason that Don has choose to
23 get one unit of merchandise, and also want to buy other
24 units. And according to my additional conversation with
25 Manop on the phone, I understand that he was not paid for

1 20 wcsr

Phuvasit Kul - cross

2 the units that he is supposed to be paid to him. That is
3 why Manop told me that he don't want to mail any more.

4 As you can see on my conversation and which
5 was on the tape --

6 MR. PERL: Your Honor, may I ask that the
7 answer be stricken.

8 THE COURT: No, I will not strike it. You
9 ask wide open questions.

10 MR. PERL: Your Honor, my question was -- may
11 I rephrase the question. I asked --

12 THE COURT: Proceed with your answer. Go ahead.

13 MR. PERL: I asked him who the guy was. That
14 was my only question.

15 THE COURT: I heard you.

16 Proceed with the answer.

17 MR. PERL: May we have the question read back?

18 THE COURT: Please, shut up.

19 MR. PERL: Your Honor, I respect the Court,
20 I don't mean to be disrespectful.

21 THE COURT: Well, you are being singularly
22 disrespectful.

23 MR. PERL: I don't mean to.

24 THE COURT: The jury will please step out.
25 We will take a short recess.

1 21 wcsr

Phuvasit Kul - cross

2 [The jury left the courtroom.]

3 THE COURT: I won't tolerate this, Mr. Perl.
4 When I rule, that's it. If you don't like what I say or
5 the way I rule, there is a Court above me that is quick
6 to reverse if I am wrong. I will not turn this into a
7 bar room debate with you or anyone else. And I fine you
8 \$200 for contempt of Court.

9 Bring in the jury.

10 MR. PERL: May I for the record say I resent
11 the Court telling me to shut up. I think I have a right
12 to answer when I am treated in that way.

2.4 13 THE COURT: You have no right to give me all
14 that guff. You provoked it.

15 MR. PERL: Your Honor, I did not give you an
16 guff.

17 THE COURT: You provoked it. I fine you \$200.
18 And if you don't shut up now, I am going to fine you \$500
19 more. Who do you think you are? Boring the jury to death,
20 going on here interminably. You get down to business and
21 finish this case.

22 All right, bring the jury out. And don't do
23 anything like that again or you will spend the night in
24 jail.

25 [Jury present.]

* * *

1 24 wcsr

Phuvasit Kul - cross

2 "Boonsak: The colored guy.

3 "Taylor: The colored guy?"

4 Who is the colored guy that you referred to in
5 that sentence?6 A [Through interpreter:] I mean Don, because
7 from what I have heard from Bangkok, they said that that
8 merchandise belonged to Don.9 Q Was Mr. Don present in San Francisco at that
10 time, on February 13, 1976?11 A [Through interpreter:] At that time I mean
12 that the merchandise in San Francisco belonged to Don.
13 I didn't mean that Don is in San Francisco.14 Q Do you recall on Page 10 of that transcript
15 saying -- Mr. Taylor says, "Yes, the guy's waiting for
16 you in San Francisco?"

17 "Boonsak: Yes.

18 "Taylor: Is he there now?

19 "Boonsak: That's, yes. That's why, that's
20 why I tell you. I try to get there very urgent, you
21 know. But I cannot make it. I spend seven days in
22 Manila for nothing. I spent a lot of money, you know!"

23 Then Boonsak again: "He lives with his friend.

24 "Taylor: He lives with his friend?"

25 Who, sir, is the gentleman that you are

1 25 wcsr Phuvasit Kul - cross
2 referring to here that lives with his friend and is in
3 California?

4 A [Through interpreter:] When I mentioned
5 colored guy, that merchandise belonged to that colored
6 guy, I mean Don, because that is what Manop told me.

7 Q Mr. Boonsak, do you understand me when I read
8 the following?

9 A [Through interpreter:] I haven't finished my
10 answer yet.

11 Q Sorry. Please finish your answer.

12 THE COURT: Mr. Head -- or Mr. Perl, I am
13 giving you five more minutes to bring your cross-examination
14 to a close.

15 MR. PERL: Your Honor, I respectfully --

16 THE COURT: Five more minutes.

17 MR. PERL: I am sorry, sir, I cannot finish it
18 in five minutes.

19 THE COURT: Well, you are going to finish in
20 five minutes, because I am cutting you off if you don't.

21 A [Through interpreter:] Manop had told me
22 prior to that time that merchandise belonged to Don and
23 it is here in San Francisco, and I have no other idea who
24 is there with the merchandise or who is -- that merchandise
25 is in anybody's place, I have no idea. Until I finish

1 26 wcsr

Phuvasit Kul - cross

2 my first business deal, then I have to call back. That is
3 a time which Don will leave.

4 Also at that time, then I was arrested, and I
5 did call back to Don, and I did talk to Don. Don confirmed
6 to me he had the merchandise here, and he is willing to
7 sell it.

8 Q Mr. Boonsak, do you recall saying to --

9 THE COURT: Please don't lean on the jury rail.
10 We don't do that here.

11 Q Mr. Boonsak, do you recall saying, "Yes, Jack,
12 Jack, the guy is waiting for me in there, right?"

13 "Taylor: Yes, the guy's waiting for you in
14 San Francisco?"

15 And you said, "Yes."

16 And then Taylor said, "Is he there now?"

17 You said, "That's, yes."

18 Who, sir, was in San Francisco at that time on
19 February 13, 1976, waiting for you?

20 A The guy that I mentioned in the conversation
21 is supposed to be the guy which I will find out when I
22 call back to Bangkok.

23 Q Did you, sir, at the time you made this
24 statement know whether or not anybody was waiting for you
25 in San Francisco?

1 27 wcsr

Phuvasit Kul - cross

2 A I don't know whether there is or there isn't,
3 because I have to call back to find out.

4 Q Did you, sir, say to Mr. Taylor, "Yes, Jack,
5 Jack, the guy is waiting for me in there, right?"

6 MR. VIRELLA: Objection. Asked and answered.

7 THE COURT: Sustained. Ad nauseam asked and
8 answered.

9 Q Did you, sir, tell Mr. Taylor that he lives
10 with his friend?

11 MR. VIRELLA: Objection; asked and answered.

12 THE COURT: Sustained.

13 Q Who is the man who lives with his friend, sir?

14 A As I have answered to your question earlier,
15 that guy or that guy that I mentioned, I have to call back
16 to Thailand to find out.

17 Q Did you make a call to Thailand before you
18 made this statement to Mr. Jack?

19 MR. VIRELLA: It is unclear, your Honor.

20 THE COURT: Sustained.

21 Q Before you had this conversation with Mr. Jack
22 on February 13, 1976, sir, did you speak to Mr. Manop in
23 Thailand about the contents of this conversation or about
24 any conversation you are going to have?

25 MR. VIRELLA: Objection.

5-7-76

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jwb-1

United States of America

vs.

76 Cr. 295

Donald Head, a/k/a "Mr. Don"

New York, New York.

May 7, 1976 - 10:25 A.M.

(Trial resumed.)

THE COURT: Good morning. We have been waiting a half hour for the alternate, Mario J. Campo, so we will proceed without him. He called in.

Go ahead.

(In open court; jury present.)

B O O N S A K P H U V A S I T K U L resumed.

CROSS-EXAMINATION (continued)

BY MR. PERL:

Q Good morning, Mr. Boonsak.

A Good morning, sir.

Q Mr. Boonsak, when you came to this country in 1974 to study, sir, what institution did you attend?

A (Through interpreter) It is New York Business School.

Q And for how long a period of time did you go to class at the New York Business School?

jwb-2

Phuvasitkul-cross

324

1 A (through interpreter) I leave about the
2
3 month of September.

4 Q I am sorry, when did you start this school?

5 MR. VIRELLA: Objection.

6 THE COURT: Sustained.

7 Q How long were you in attendance at the New York
8 Business School, sir?

9 A (through interpreter) About two to three months.
10 I can't remember.

11 Q How many days a week did you attend school --
12 class there, during those two or three months?

13 A Five days a week, sir.

14 Q Five days a week. And could you tell, please,
15 how many hours a day did you attend class during those
16 five days a week?

17 A I started at 9:00 or 9:30 -- I couldn't
18 remember -- and I finished during lunch time, sir.

19 Q Sir, were those classes conducted in English?

20 MR. VIRELLA: Objection, your Honor.

21 THE COURT: Sustained.

22 Q What language were those classes conducted in?

23 THE COURT: Sustained. It is the same question
24 in another form. It is totally immaterial.

25 MR. PERL: Your Honor, I submit the witness

jwb-3

Phuvasitkul-cross

states he has a language problem. I would like to ascertain what was going on at that time.

THE COURT: I will take judicial notice that he has a language problem.

Proceed.

Q Did you have an interpreter with you when you attended class?

MR. VIRELLA: Objection.

THE COURT: Sustained.

Q Did anyone help you --

THE COURT: Sustained. Turn to another subject. Your time is limited. I suggest you get down to business.

MR. PERL: Your Honor, if I may, I am simply trying to resolve the question of a language barrier.

THE COURT: That has been resolved. I appointed an interpreter. I don't do that just to waste the public's money.

Proceed.

MR. PERL: Your Honor, I will be happy to discuss it in private with the Court.

Q Mr. Boonsak, do you recall yesterday that I discussed with you the conversation that you had on February 13 with Mr. Taylor. In part of the conversation you said, "Yes, Jack, Jack, the guy is waiting for me

* * *

jwb-42

* * *

"Head: Yes, when I get there."

Not one question asked of Mr. Phuvastikul on cross-examination: "What are you talking about, what are you talking about?"

Later on in the same conversation Boonsak says, "Hey, Don, I saw, I forget one thing, is your merchandise still here, right?"

"Head: Right.

"Boonsak: Okay, how many did you have it?

"Head: Over there?

"Boonsak: Yes.

"Head: Ah, I guess about, about four or five. Ask yourselves, four or five what?

And then Boonsak: "Yeah, you know, I, I, one thing I tell you about the price. Kum Boonterm he sent it here, he get 35,000, but it -- it is the one that you have here that give 45,000 or \$50,000 for each unit.

"Head: Right, very good."

It was a very good price for that package, \$35,0

You also heard testimony at the time Sergeant Head was arrested at the Air Base that he had a little package with him from Washington, D.C., Government Exhibit 15, and in that package, ladies and gentlemen, we submit to you that you can infer that this is the reason for

1 jwb-43

2 for sending packages like that to New York; that this
3 came from Washington, 26,000.

4 Postal inspectors don't make that kind of
5 money today.

6 But we submit to you that for people who traffic
7 in drugs -- it don't mean a day's work.

8 Now, ladies and gentlemen, Boonsak Phuvasitkul
9 admitted his guilt and I will be sitting down in about a
10 minute. And when I sit down, Mr. Perl will get up and
11 give his version of what the Government has proved to you.
12 And he will be attacking the credit of Mr. Phuvasitkul.

13 Keep in mind, ladies and gentlemen, Phuvasitkul
14 pleaded guilty, he admitted his role, he admitted his
15 function and his part in this conspiracy and transaction.

16 Keep it in mind when Mr. Perl talks about
17 Government Exhibit 66A and the conversation between Boonsak
18 and the defendant. Again keep your eyes on the facts
19 when he speaks to you.

20 Boonsak Phuvasitkul has had his day in court.
21 It is now Sergeant Head's day in court. The Government
22 submits the evidence we have presented to you has clearly
23 established that the defendant Head is guilty as we have
24 charged him.

25 Thank you.

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51 jwmch

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THE COURT: All right. We will set May 25th for sentencing.

MR. PERL: Your Honor, can you make that one day earlier if it would be convenient to the Court?

THE COURT: May 24th.

Morning?

MR. PERL: That is up to your Honor's convenience.

THE COURT: All right. 10:00 a.m. in the morning.

The defendant is remanded.

(The defendant left the courtroom.)

THE COURT: You and I still have some matters here.

Have you had occasion to think about what occurred yesterday afternoon, Mr. Perl?

MR. PERL: Yes, your Honor, I have. I am sure that your Honor acted earnestly, but I most sincerely state to the Court I think I acted with respect to my own sense of feeling as an officer of the Court for twenty years or so. I never had an incident such as we did yesterday.

Your Honor did -- I'm sure that you may have been --

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THE COURT: Have you read the transcript?

MR. PERL: No, sir, I have not.

THE COURT: I suggest you read it.

MR. PERL: Your Honor, if I recall correctly,
the thing that upset me, I think your Honor yelled
"Shut up" to me.

THE COURT: I had to, because you kept
interrupting. I had ruled, ruled and ruled.

MR. PERL: If the Court wishes to tell me to
be quiet or something like that --

THE COURT: Perhaps the words "shut up"
were not the words, but the conduct for which I yelled at
you had happened before.

MR. PERL: Sir, I don't recall --

THE COURT: Unless there is an apology, I
intend to hold you in contempt. That will be criminal
contempt.

MR. PERL: Your Honor has that power. You put
me in the position where I --

THE COURT: I would like you to review the
transcript, and if you don't feel that you should apologize,
that is your privilege.

MR. PERL: Your Honor, I can honestly say
that the use of the word "shut up" is what offended.

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2 You have every right to tell me to sit down and be quiet.
3 The Court has that power; I recognize it. But I don't
4 think you should have yelled "Shut up," sir.

5 THE COURT: It may not have been the right
6 word. But that doesn't excuse your contemptuous conduct.

7 Since you don't see fit to apologize, and
8 I have given you the chance to do so, I will go through
9 with it.

10 MR. PERL: Your Honor, if my conduct was
11 contemptuous --

12 THE COURT: It sure was. And I will file --

13 MR. PERL: I didn't intend to be, sir, but
14 I took offense at the word "shut up." I don't think it
15 was proper.

16 I didn't want to be contemptuous of the
17 Court, but I reacted to that phrase. That is about as
18 honest as I can be, sir.

19 THE COURT: You gave me a lot of lip on a
20 ruling that may or may not have been right. You disrupted
21 the trial. I had excused the jury. And it just isn't
22 done.

23 I had cautioned you about it before that on
24 the Wheaton suppression problem. I ruled on that. You
25 kept on arguing out there. And you were out of order,

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2 way out of order.

3 You lock it over.

4 Unless I get a sincere apology, I intend to
5 go through with it.

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CHARGE OF THE COURT

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CHARGE OF THE COURT

MacMahon, J.

THE COURT: It is now my function to instruct you on the law that applies to the facts as you find them in this case.

I am the exclusive judge of the law, and it is your duty to accept the law as I give it to you in these instructions, whether or not you agree with them or whether or not you think the law ought to be something different from what it is.

Just as I am the exclusive judge of the law, you are the exclusive judge of the facts. You and you alone decide what weight, what effect and what value you will give to the evidence. You and you alone decide whether or not to believe a witness. And, ultimately, you and you alone decide the guilt or innocence of this defendant.

You are not to conclude from any rulings that I may have made throughout this trial, or any questions that I asked, that I have any opinion one way or the other as to whether this defendant is guilty or not guilty. That decision is exclusively up to you.

In making my rulings, I was simply doing

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2 my duty to try to keep this case on the track, to try
3 to confine it to the relevant material, to the end that
4 you, the jury, could decide just where the truth lies.

5 All of our proceedings in a courtroom are
6 designed to that end, and it is my duty to see that we
7 observe the rules and procedure so that we don't get
8 lost in a lot of irrelevance, and a lot of by-ways and
9 side-ways, but try to focus on the search for the truth
10 in the evidence as it relates to the charge in the case.

11 Finding the facts is merely a process by
12 which you, the jury, consider the exhibits which have
13 been received in evidence, consider the testimony of all of
14 the witnesses, both on direct and on cross-examination,
15 sift out what you believe, weigh it in the scale of your
16 reasoning powers and common sense, and draw such conclusions
17 as your experience in life and your common sense tell you
18 the evidence supports and justifies and decide just where
19 the truth lies in this case.

20 In this connection, all evidence is of two
21 general types: Direct evidence and circumstantial evidence.

22 Evidence is direct when the facts are shown
23 by exhibits which are admitted into evidence, or when
24 sworn to by witnesses who have personal knowledge of
25 them from something that they have observed, something that

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2 they have heard, something that they have touched, and so on.

3 Circumstantial evidence is simply the drawing
4 of a logical conclusion from other connected facts that
5 are established by direct evidence.

6 The classic example of circumstantial evidence
7 is Robinson Crusoe's sighting of the footprint on the
8 sand. He knew from his personal knowledge and his obser-
9 vation that up to that point he had not made the footprint.
10 And so the only logical conclusion from the other footprint
11 of a human being was that there was another man on the
12 island.

13 Not all circumstantial evidence is that compelling,
14 but this is a process that we all use in our daily lives,
15 and you apply the same process here.

16 You ladies who are mothers have children, and you
17 know when your child or grandchild comes in with jelly all
18 over his face, no matter what he tells you, you know he has
19 been in the jelly jar. You are familiar with this process
20 of drawing conclusions from other facts, conclusions that of
21 your own common sense tells you must be so.

22 Circumstantial evidence is just as effective
23 and every bit as valuable as direct evidence, for in
24 either case, before you can convict the defendant, you
25 must be convinced beyond a reasonable doubt.

In this connection, it is your memory of the

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2 evidence that controls; it is not the way I remember it and
3 it is not necessarily the way counsel remember it.

4 I have no intention of boring you with any
5 review of this evidence. I am sure you have it all very
6 fresh in mind. I want to caution you that if your memory
7 squares with the lawyers' memory as they argued what they
8 thought the evidence showed in their closing statements,
9 you can accept what they say, but if you have a different
10 recollection, it is your memory that controls and you
11 are bound by your oath to reject anything that does not
12 square with your memory.

13 When I say "your memory," I mean your collective
14 memory. You should help each other try to remember what
15 the evidence is. If you can't remember some of it, the
16 other one maybe can stimulate your memory.

17 But if, in the end, you still cannot remember
18 it, and you do want some of the testimony read, if your
19 forelady will send me a note specifying what you want,
20 I will have the court reporter search through his notes
21 and try to find it for you.

22 Bear in mind, though, that that is a time-
23 consuming process, one to be used with restraint, and
24 you have to hear it both on direct and on cross-examination.

25 This case in the main has centered the evidence

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2 here around these physical exhibits which we have in
3 evidence, and which you may have if you want them during
4 your deliberations, and you obtain those by the same
5 process: simply ask through your forelady. Send in a
6 note that you want the exhibits and we will send them in.

7 One of your most important functions is to
8 decide which witnesses you will believe; and this is so
9 as to every witness, whether called by the Government,
10 or whether a government agent or no matter who. It is
11 your exclusive function to decide the credibility of
12 witnesses.

13 In this connection you are not to be influenced
14 by the number of witnesses called. Your concern is not
15 with the quantity of the evidence, but with the quality of
16 the evidence.

17 The first test which you should apply in
18 determining whether to believe a witness is to measure
19 what he says against your plain, everyday common sense.
20 You are not bound to believe statements which insult your
21 intelligence just because they are made under oath on a
22 witness stand.

23 You saw the witnesses in this case. I observed
24 that you were watching them all very carefully as they
25 testified. Obviously you were sizing them up. The witness

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2 made an impression on you, and you should use that impression
3 in judging his credibility.

4 Was the witness being frank with you?

5 Was his story straightforward or was it
6 evasive?

7 More importantly probably than anything
8 else, how does it check out with the other evidence in
9 the case, with the evidence that can't lie, with the
10 documentary evidence, with the tape recordings in this
11 case?

12 Was the witness trying to conceal any fact?

13 Was he confused?

14 Was he honestly confused? Or was he feigning
15 confusion?

16 These are questions for you to decide.

17 Is the witness interested in any way in the
18 outcome of this case?

19 How strong or weak was his memory of important
20 events?

21 And, in that connection, the transactions we
22 are concerned with here only occurred last March. This
23 is probably one of the products of the new federal speedy
24 trial rule. So we aren't trying to remember something here
25 that happened years ago, but something that happened last

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2 March.

3 How strong or how weak was the memory of the
4 witness?

5 In short, can you rely on him? Was he hostile
6 or friendly to any side?

7 You also consider his opportunity to know the
8 facts about which he is testifying.

9 Are there any inconsistencies in his testimony?
10 And, if so, how important are they?

11 Has he made any inconsistent statement on
12 some prior occasion? And, if so, how important is that?

13 You recall that the Government offered the
14 testimony of a chemist employed by the Drug Enforcement
15 Administration, who testified that he had examined the white
16 powder which we have received in evidence here, I believe
17 as Exhibit 1.

18 MR. VIRELLA: Yes, your Honor.

19 THE COURT: And he testified that he found from
20 the result of his clinical analysis that it was one hundred
21 percent pure heroin. His opinion was received in evidence
22 to help you in this technical field of what constitutes
23 narcotic drugs, where most of us have no knowledge and
24 are unable to make the appropriate chemical test.

25 Of course, you should give consideration to the

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2 expert's opinion, but you are not bound by it. It serves
3 merely to help you understand the evidence in this case.

4 It is your function to weigh the evidence
5 and the ultimate value of the expert's opinion and that,
6 in turn, depends upon the facts which you, the jury, find
7 established from the underlying testimony of other
8 witnesses and the exhibits which have been received in
9 evidence.

10 The defendant Donald Head did not take the
11 stand. A defendant is not required to take the stand and
12 testify in his own behalf. He has no burden of proof
13 whatever to sustain in this case. He has denied the
14 charges made against him here by his plea of not guilty,
15 and under our law, he is presumed to be innocent.

16 The fact that he has not testified cannot be
17 taken into consideration by you in any manner. You may
18 not permit that fact to weigh in the slightest degree
19 against the defendant Head, nor should that fact even
20 enter into your deliberations in any way.

21 Boonsak Phuvastikul testified that he
22 participated in the crimes charged here. If you find that
23 he did, then he is an accomplice and you should consider
24 that fact in testing his credibility and in weighing his
25 testimony.

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2 Obviously a witness is not incapable of telling
3 the truth about what occurred because he claims to be
4 an accomplice, but you must examine his testimony and act
5 upon it with caution.

6 In the prosecution of a crime, the Government
7 is frequently called upon to use persons who claim to
8 be accomplices. Often it has no choice; they are properly
9 used. After all, the Government must rely upon witnesses
10 to transactions, whoever they are. Otherwise, in many
11 instances, it would be difficult to detect and to prosecute
12 wrongdoers.

13 This is particularly so in cases of a conspiracy
14 Frequently it happens that only those on the inside of the
15 illegal plan can give evidence which is material and important
16 to the case.

17 There is no requirement that the testimony of
18 an accomplice be corroborated. By that I mean it does not
19 have to be backed up or supported by other evidence. A
20 conviction may rest upon the testimony of an accomplice
21 alone, if you believe him.

22 The credibility of Boonsak, like that of all
23 the witnesses, is for you and you alone to determine,
24 taking into account any interest that he might have in
25 this case, any motive he might have to testify falsely,

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2 any inducement or consideration that he may have received
3 or may hope to receive from the Government, any hostility
4 that he may bear toward this defendant, and any other
5 evidence which you recall and believe may tend to
6 influence or color his testimony.

7 If you find that any witness has deliberately
8 and wilfully lied as to any material fact in his testimony
9 offered at this trial, you may follow either one of two
10 courses: You may, if you wish, reject every single thing
11 he said; or, if you wish, you can accept as much of his
12 testimony as you believe and reject the rest of it.

13 Before discussing the crimes charged here, I
14 want to remind you that an indictment is a mere accusation.
15 It is not evidence of the truth of the charge made, and you
16 are to draw no inference of guilt from the mere fact that
17 this defendant has been indicted. An indictment simply
18 means that the defendant has been accused, and, as I
19 told you earlier, the defendant Head has denied the charge
20 made against him here by his plea of not guilty.

21 The defendant has no burden of proof to sustain
22 in this case. He is under no obligation to produce any
23 witnesses. He is presumed to be innocent, and this
24 presumption of innocence continues throughout the trial and
25 during your deliberations. This presumption of innocence

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2 is overcome when, and only when, the Government establishes
3 the guilt of the defendant beyond a reasonable doubt.

4 A reasonable doubt, as the phrase implies,
5 is a doubt that is based upon reason, a reason which
6 appears in the evidence or in the lack of evidence. It
7 is not some vague, speculative, imaginary doubt, nor a
8 doubt based upon emotion, sympathy or prejudice, or upon
9 what some juror might regard as an unpleasant duty.

10 The Government is not required to prove a
11 defendant's guilt beyond every possible doubt, nor to an
12 absolute or mathematical certainty, because such measure
13 of proof is usually impossible in human affairs.

14 You should review all the evidence as you
15 remember it, sift out what you believe, discuss it,
16 analyze, weigh it, and compare your view of the evidence
17 with that of your fellow jurors.

18 If that process produces a solemn belief or
19 conviction in your mind, such as you would be willing to
20 act upon without hesitation if this were an important
21 matter of your own, then you may say that you have been
22 convinced beyond a reasonable doubt.

23 On the other hand, if, after going through
24 that process, your mind is wavering or so uncertain that
25 you would hesitate before acting if this were an important

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2 matter of your own, then you havenot been convinced
3 beyond a reasonable doubt and your verdict must be not
4 guilty.

5 The indictment in this case contains five
6 counts, but only counts 1, 4 and 5 are before you for
7 your decision.

8 Each of these counts charges a separate crime,
9 and you must consider each count separately.

10 I also wish to point out that although the
11 indictment names six defendants, only the defendant Donald
12 Head is on trial before you. He is the only person whose
13 guilty or innocence you must announce in your verdict,
14 although, as I will explain to you shortly, in considering
15 his guilt or innocence you may have to determine the nature
16 of the participation, if any of the other persons named.

17 In the determination of guilt or innocence, you
18 must bear in mind that guilt is personal. There is no
19 such thing under our system of justice as guilt by mere
20 association. The guilt or innocence of the defendant Head
21 must be determined separately with respect to him solely
22 on the evidence presented against him, or on the lack of
23 evidence.

24 Now let us turn to the specific charges in
25 this case.

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2 The indictment here is not too long. I will
3 read it.

4 Count 1 charges that:

5 "From on or about the 1st day of September,
6 1975 and continuously thereafter up to and including the
7 date of the filing of this indictment, in the Southern
8 District of New York and elsewhere, Donald Head, a/k/a
9 'Mr. Don,' Bruce Wheaton, Boonterm Petkamnerd, Boonsak
10 Phuvasitkul, a/k/a 'Sammy,' Manop Saiphantong, and Perm
11 Petkamnerd, the defendants, and others to the grand jury
12 unknown, unlawfully, intentionally and knowingly combined,
13 conspired, confederated and agreed together and with each
14 other to violate" certain numbered sections of the United
15 States Criminal Code.

16 "It was part of said conspiracy that the said
17 defendants and others unknown unlawfully, intentionally
18 and knowingly would manufacture and distribute large amounts
19 of heroin, a Schedule I narcotic drug controlled substance,
20 in Thailand and elsewhere intending and knowing that the
21 said heroin would be unlawfully imported into the United
22 States, in violation" -- again of certain sections of
23 the United States Criminal Code.

24 "It was further a part of said conspiracy
that the said defendants and others unknown to the Grand

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2 Jury, unlawfully, intentionally and knowingly would import
3 into the United States from places outside thereof, to
4 wit, Thailand, quantities of heroin, a Schedule I narcotic
5 drug controlled substance, the exact amount being unknown
6 to the Grand Jury, in violation" -- again of certain
7 sections of the United States Criminal Code.

8 "4. It was further part of said conspiracy
9 that the said defendants unlawfully, intentionally and
10 knowingly would distribute and possess with intent to
11 distribute heroin, a Schedule I drug controlled substance,
12 the exact amount thereof being to the Grand Jury unknown" --
13 again in violation of certain sections of the United States
14 Criminal Code.

15 Then the indictment goes on:

16 "The Means Used by the Defendants to Accomplish
17 the Objects of the Conspiracy.

18 "Among the means whereby the defendants and
19 others unknown to the Grand Jury would and did carry out
20 the objects of said conspiracy, and insure the success of
21 the unlawful venture to import, buy, sell and distribute
22 heroin for profit, were the following:

23 "(a) The defendants Boonterm Petkamnerd,
24 anop Saiphantong and Perm Petkamnerd were Thai nationals
25 who served as sources of supply for multi-kilogram

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quantities of pure heroin to be shipped by their co-conspirators to the United States.

"(b) The defendant Donald Head, a/k/a 'Mr. Don,' is and was at all times relevant to this indictment a Staff Sergeant in the United States Air Force assigned to the United States Air Mail Military Terminal, Air Force Post Office, located at Don Muang, Thailand as a postal shift supervisor. Using this official position, the defendant Donald Head, a/k/a 'Mr. Don,' would and did use the United States Military postal system to mail large quantities of heroin into the United States.

"(c) Upon arrival in the United States, the heroin was purchased and redistributed by the defendants Bruce Wheaton and Boonsak Phuvasitkul, a/k/a 'Sammy.'

The indictment then goes on to allege certain overt acts, and I will come to them a little later.

In short, this first count charges these named defendants and other unknown persons with a conspiracy to violate the federal narcotics laws.

In order to convict the defendant Head on this conspiracy charge set forth in count 1 of this indictment, the Government must prove to your satisfaction beyond a reasonable doubt three facts:

1. The existence of the conspiracy charged in

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2 the indictment among the defendant named, and others
3 unknown.

4 Fact 1: the existence of the conspiracy.

5 Fact 2: that the defendant Head joined the
6 conspiracy with knowledge of its unlawful purpose.

7 Fact 3: that any one of the conspirators
8 committed at least one overt act in furtherance of the
9 conspiracy.

10 I will now explain what those terms mean.

11 The first element of the crime of conspiracy
12 is the existence of the conspiracy.

13 What is a conspiracy? A conspiracy, for our
14 purpose, is simply a combination or an agreement among two
15 or more people to violate the law as charged in this
16 indictment. Thus, a conspiracy is a kind of a partnership
17 in criminal purpose, and it is usually secret in its
18 original.

19 The gist of the crime is a combination of
20 agreement among two or more people to deal illegally and
21 knowingly in the narcotics business. This does not mean that
22 two or more persons must meet and sign some formal partnership
23 agreement, or it does not mean that they must sit down and
24 agree in so many words on what their unlawful plan is to
25 be, or how they are going to carry it out.

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2 When persons enter into an agreement or
3 combination to violate the law, much is left to implication
4 and to tacit understanding. Conspirators do not proclaim
5 their plot or publicly announce their plans.

6 The very nature of the conspiracy calls for
7 secrecy.

8 The first element is satisfied, therefore,
9 if you find beyond a reasonable doubt that any two or more
10 people in any way intentionally combined or agreed to a
11 common plan knowingly and intentionally to deal in
12 narcotics, to import them into the United States, to
13 smuggle them here as charged in this indictment.

14 In determining whether there was such a
15 combination, understanding or agreement, you should consider
16 all of the evidence about this defendant's conduct and
17 the other defendants' conduct, their acts and their
18 statements, and you should consider not only what was said
19 or done, but also the manner and the way it was done or
20 said.

21 Actions speak louder than words. You should,
22 therefore, ask yourselves whether these transactions shown
23 in the evidence were conducted in a simple, straightforward
24 manner as innocent business transactions are, or whether
25 they were purposely made, concealed, and circuitous, devious

1 20 jwmch

2 and hidden, whether the meetings were open or secret,
3 whether the persons involved tried to hide or conceal
4 their identities in any way, whether they dealt in large
5 amounts of currency, and any other evidence which you
6 recall and believe as to the manner in which the defendants
7 conducted their affairs, and whether the defendants'
8 dealings were open and aboveboard, or whether they were
9 surrounded by that secrecy and intrigue which are the stamp
10 of a conspiracy.

11 From the point of view of the law, there is
12 danger to the public when two or more people combine to
13 commit a crime. The danger is greater than if the lone
14 criminal acts by himself, because in numbers there is
15 strength, and two or more people are able to accomplish
16 crimes that are more difficult to detect and more harmful
17 to the public.

18 Because of this, a conspiracy to commit a
19 crime is a distinct crime in and of itself, separate and
20 apart from the crime which it is the object of the conspirac
21 to accomplish.

22 Here, for example, the mere agreement followed
23 by overt acts, followed by membership to sell narcotics,
24 to smuggle narcotics into the United States is in itself
25 a crime, whether or not a single ounce is actually ever

1 21 jwmch

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2 smuggled into the United States.

3 Thus, a conspiracy may be found to exist,
4 although the purpose of the conspiracy is never accomplished.

5 Proof, however, that the purpose of the
6 conspiracy was accomplished is the most persuasive evidence
7 of the existence of the conspiracy itself.

8 The period of time charged in the indictment
9 runs from on or about September 1, 1975 and continuously
10 thereafter up to and including March 25, 1976. It is not
11 necessary for the Government to prove that the conspiracy
12 alleged started and ended on those specific dates. It is
13 sufficient if you find that a conspiracy was formed and
14 that it existed for some substantial time within the period
15 set forth in the indictment.

16 Similarly, it is not necessary for the
17 Government to prove that all the means alleged in the
18 indictment were employed. It is sufficient that the
19 Government proves that any of those means were used.

20 You will recall that the second fact which
21 the Government is required to prove beyond a reasonable
22 doubt is that the defendant joined the conspiracy with
23 knowledge of its unlawful purpose. When I say "joined
24 the conspiracy," I don't mean that the Government has to
25 prove that the defendant ever said, "Count me in," or

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2 ever said, "I agree to it," or signed some kind of a
3 formal application for membership.

4 However, before you can find any defendant to
5 be a member of a conspiracy, you must find that he knew
6 of the existence of the conspiracy. That means that he
7 knew that others had combined to violate the law, and
8 that he knew of the unlawful purpose; and that, knowing
9 these facts, he voluntarily and knowingly joined in the
10 plan with an intent to combine with others to violate the
11 law. He must knowingly promote the unlawful venture or
12 have a stake in its success.

13 You will note that I have said that the defendant
14 must have acted knowingly, wilfully and intentionally.
15 This does not mean that the defendant must be aware that
16 his conduct is criminal or that it is against the law.

17 "Knowingly" simply means that he must have known
18 what he was doing, i.e., the Government must prove that
19 he knew that he was joining with others in this illicit
20 narcotics business alleged in this indictment; that he
21 knew that he was joining or participating with others
22 in a common plan to deal in heroin in the manner
23 charged here; and that he did so voluntarily,
24 deliberately and on purpose, and not because he was
25 laboring under some mistake, accident, carelessness or some

1 23 jwmch

2 other innocent reason.

3 Here again, in determining the intent of the
4 defendant, it is obviously impossible to look into his
5 mind. However, intent and knowledge may be inferred from
6 the way a defendant acts, by his statements, and by all
7 the surrounding circumstances. Thus, the adage, "Actions
8 speak louder than words," also applies here.

9 In this connection, you may not rely on
10 statements of one defendant to find that another defendant
11 was a member of the conspiracy. You must determine the
12 defendant's membership in this conspiracy or his non-
13 membership solely from the evidence concerning what this
14 defendant did, what this defendant said, and from his own
15 actions and conduct.

16 The mere fact that a defendant may witness a
17 crime or be present when others commit a crime, or that
18 he has a friendship with persons who are committing the
19 crime, or even if he unwittingly assists the venture,
20 or associates or has a friendship or a business relationship
21 with a member of the conspiracy, is not in and of itself
22 enough to make him a conspirator, unless you first find
23 beyond a reasonable doubt that he knew of the conspiracy
24 and that he intentionally joined the illegal plan with
25 knowledge of its unlawful purpose and with a stake in its

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2 success.

3 One may become a member of a conspiracy with
4 knowledge of all of the details, or all of the operations
5 of the conspiracy. One defendant may know only one other
6 member of the conspiracy. Yet if he knowingly cooperates
7 to further the illegal purpose, with knowledge that
8 others have combined to violate the law, he becomes a
9 member, although his role may be only an insignificant
10 or subordinate one.

11 Now, if you find that the defendant did join
12 the conspiracy with knowledge of its illegal purposes,
13 then he is bound by what others say and do after he becomes
14 a member, provided what the others do is in furtherance
15 of the objects of the conspiracy; and this is true even
16 though he, himself, is not present, provided he is still
17 a member.

18 This is so because each member of a conspiracy,
19 as I explained earlier, is a partner or agent of every
20 other member of the conspiracy. Therefore, what one does
21 to promote the illegal plan or illegal agreement binds
22 every other member of the conspiracy.

23 The third element or fact which the Government
24 must prove beyond a reasonable doubt is that at least one
25 overt act was committed by any conspirator in furtherance

1 25 jwmch

2 of the object of the conspiracy.

3 "Overt act" means an act by any member of the
4 conspiracy in an effort to accomplish some purpose of the
5 conspiracy.

6 The reason law requires an overt act is
7 because a person might agree to commit a crime and then
8 change his mind. Therefore, before a defendant can be
9 convicted of conspiracy, one or more of the conspirators
10 must have taken at least one step or performed one single
11 act which moved directly toward carrying out the unlawful
12 plan to commit the crime.

13 The Government has alleged eight overt acts,
14 and I will now read them. Before I do so, you will notice
15 that some of these acts are innocent in and of themselves;
16 nevertheless, if those acts were performed by any member
17 of the conspiracy during the existence of the conspiracy and
18 in furtherance of its purposes, then those acts are
19 sufficient to satisfy proof as to this third fact.

20 Here are the overt acts:

21 "In pursuance of the said conspiracy and to
22 effect the objects thereof, the following overt acts were
23 committed in the Southern District of New York and
24 elsewhere:
25

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2 "1. In or about September, 1975, the
3 defendants Boonsak Phuvasitkul, a/k/a 'Sammy,' and
4 Manof Saiphantong had a conversation in Bangkok, Thailand.

5 "2. In or about December, 1975, the defendants
6 Boonterm Petkamnerd, Boonsak Phuvasitkul, a/k/a 'Sammy,'
7 Manop Saiphantong, and Perm Petkamnerd met in a coffee
8 shop located in Bangkok, Thailand where they had a conver-
9 sation regarding the importation of heroin from Thailand
10 into New York, New York.

11 "3. In or about February 4, 1976, the
12 defendants Donald Head, a/k/a 'Mr. Don,' Boonterm Petkamnerd,
13 Boonterm Petkamnerd, Boonsak Phuvasitkul, a/k/a 'Sammy,'
14 Manop Saiphantong and Perm Petkamnerd met in an
15 apartment house located at Soi 13 in Bangkok, Thailand
16 where they discussed the mailing of approximately 700 grams
17 of heroin into New York, New York from Bangkok, Thailand.

18 "4. In or about February 15, 1976, in Bangkok,
19 Thailand, the defendant Boonterm Petkamnerd gave the
20 defendant Boonsak Phvasitkul, a/k/a 'Sammy,' a slip of
21 paper containing the address of the defendant Bruce
22 Wheaton which read as follows:

23 "'Bruce E. Wheaton., 1048 E. 228 S.T.,
24 Bronx 10466, New York, U.S.A.'

25 "5. In or about March 8, 1976 the defendant

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2 Boonsak Phuvasitkul, a/k/a 'Sammy,' had a conversation
3 in New York, New York with undercover agents regarding the
4 mailing of heroin from Thailand.

5 "6. In or about March 10, 1976 the defendants
6 Boonsak Phuvasitkul, a/k/a 'Sammy,' and Donald Head,
7 a/k/a 'Mr. Don,' had a telephone conversation concerning
8 the mailing of money from New York, New York to Bangkok,
9 Thailand.

10 "7. In or about March 1976, the defendant
11 Donald Head, a/k/a 'Mr. Don,' had in his possession
12 approximately \$26,800 in cash at Don Muang, Thailand.

13 "8. In or about March 1976 the defendants
14 Boonsak Phuvasitkul, a/k/a 'Sammy,' and Bruce Wheaton
15 had a telephone conversation concerning the sale of
16 two units of heroin."

17 The Government is not required to prove that
18 all of the eight overt acts alleged were committed.
19 It is enough if the Government proves beyond a reasonable
20 doubt that at least one of the overt acts was committed
21 in furtherance of the purposes of the conspiracy and
22 that that act was committed by any one or more members of
23 the conspiracy, whether or not that member is a defendant
24 now.
25

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2 You will note here that these acts are
3 alleged to have occurred on or about certain dates. As
4 I told you earlier, the Government is not required to prove
5 that the act occurred on those exact dates. It is sufficient
6 if the testimony establishes that the act occurred within
7 a few weeks of the date alleged.

8 The same is true as to the place of the acts.
9 They must be substantially similar. There is no requirement
10 that they be exactly those alleged.

11 If you find that the Government has failed to
12 prove beyond a reasonable doubt all three of the facts
13 constituting the crime of conspiracy as I have defined
14 them, then you must acquit the defendant Head on count 1.

15 On the other hand, if you find that the
16 Government has proved beyond a reasonable doubt that a
17 conspiracy existed from on or about September 1, 1975,
18 continuously up to and including March 25, 1976,
19 knowingly and intentionally to violate the federal narcotics
20 laws as charged in the indictment, that the defendant
21 knowingly joined the conspiracy with knowledge of its
22 unlawful purpose, and that any one of the conspirators
23 committed at least one overt act charged in the indictment
24 in furtherance of the conspiracy, then you should convict
25 the defendant Head on count 1.

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Count 4 of this indictment charges that:

"On or about the 23rd day of February, 1976, in the Southern District of New York, Donald Head, a/k/a 'Mr. Don,' Bruce Wheaton, Boonterm Petkamnerd, Boonsak Phuvasitkul, a/k/a 'Sammy,' Manop Saiphantong, and Perm Petkamnerd, the defendants, unlawfully, intentionally and knowingly did import and caused to be imported into the customs territory of and into the United States, to wit, New York, New York, from a place outside thereof, Bangkok, Thailand, a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride."

In order to convict the defendant Head on count 4, the Government must prove to your satisfaction beyond a reasonable doubt each of the following facts:

1. That on or about the date specified in count 4, the defendant Head imported and caused to be imported into the customs territory of the United States, in this instance New York City, a narcotic drug controlled substance, in this instance heroin.

As to this fact, "import" means the bringing into or introduction of any article into the customs territory of the United States. The term, "customs territory of the United States," as used here means

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2 New York City.

3 The second element or fact that the Government
4 must prove is that the narcotic drug-controlled substance
5 involved was heroin hydrochloride. Here I instruct you,
6 as a matter of law, that heroin hydrochloride is narcotic
7 drug-controlled substance.

8 This second element is satisfied if you find
9 that the white powder in Government's Exhibit 1 is in
10 fact heroin.

11 The third fact which the Government is required
12 to prove is that in importing and causing the heroin to
13 be imported, the defendant acted knowingly and wilfully.
14 As to this element you should consider and apply all that
15 I have previously charged you on the subject of knowledge
16 and wilfulness in my earlier instructions, in discussing
17 the conspiracy count.

18 In short, did this defendant mail the package into
19 customs territory, did he know it contained heroin, and
20 did he do it intentionally and on purpose?

21 I will now turn to the fifth count.

22 "On or about the 23rd day of February, 1976,
23 in the Southern District of New York, Donald Head,
24 a/k/a 'Mr. Don,' Doonterm Petkamnerd, Boonsak Phuvasitkul,
25

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a/k/a 'Sammy,' Bruce Wheaton, Manop Saiphantong, and Pern Petkamnerd, the defendants, unlawfully, intentionally and knowingly did distribute and possess with intent to distribute a Schedule I narcotic drug controlled substance, to wit, approximately 638 grams of heroin hydrochloride."

In order to convict the defendant Head on count 5, the Government must prove to your satisfaction beyond a reasonable doubt each of the following elements:

1. That on or about the date specified in this indictment, the defendant either distributed heroin or possessed heroin with an intention to distribute it.

The first element is satisfied if you find that the defendant either intentionally distributed heroin, or knowingly possessed heroin with an intent to distribute it. The word "distribute" means the actual constructive or attempted transfer of heroin. The word "possession" means either actual physical possession of the heroin, or such power ^{or} control over the heroin that the defendant could cause it to be moved, or cause others to move it at his discretion.

This is what is known as constructive possession.

The word "intent," of course, refers to the defendant's state of mind.

So the term, "possess with intent to distribute,"

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means to control heroin with a state of mind or purpose to transfer it.

The second element of this crime charged in the fifth count is that the substance which was distributed or possessed with an intent to distribute it was in fact heroin. This element is satisfied if you find that the substance in Government's Exhibit 1 is heroin.

The third element is that in distributing heroin or in possessing heroin with an intent to distribute it, the defendant acted knowingly and wilfully.

As to this third element, you should again apply and consider all that I have previously charged you on the subject of what constitutes knowledge and wilfulness.

As to counts 4 and 5, it is not necessary for the Government to show that the defendant Head personally committed the crime charged in those counts personally. The law provides that a person who aids and abets -- in other words, somebody who helps -- another to commit a crime is just as guilty of that crime as if he had committed it directly himself.

Accordingly, you may find the defendant Head guilty of the crime charged in count 4 and of the crime charged in count 5 if you find beyond a reasonable doubt

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2 that he aided or abetted some other person in the
3 commission of the crime charged in the count which you are
4 considering.

5 Here the Government contends that the
6 defendant Head aided and abetted the other defendants named
7 in counts 4 and 5 in committing the crime charged in
8 each of those counts.

9 Before you can convict the defendant Head for
10 aiding and abetting, however, you must find that the crime
11 charged was committed by another person, and that the
12 defendant Head consciously associated himself with the
13 criminal venture with an intent that his conduct would
14 help it succeed. You must be convinced beyond a reasonable
15 doubt that he was doing something to aid the crime, or
16 to forward the crime of the other person; that Head was
17 a conscious, knowing participant in the crime with a stake
18 in its success, rather than a mere bystander, witness
19 or spectator on the scene of a crime when it was committed
20 by another.

21 You must consider each of counts 4 and 5
22 separately. If you find with respect to the count which
23 you are considering that the Government has failed to
24 prove beyond a reasonable doubt each of the three elements
25 of the crime which I have given to you, or that the

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2 defendant Head knowingly aided and abetted another in the
3 commission of the crime charged in the count which you
4 are considering, you should not hesitate to return a verdict
5 of not guilty on that count.

6 On the other hand, if you find with respect
7 to the count which you are considering that the Government
8 has proved beyond a reasonable doubt all three elements
9 of the crime which I have given to you, or that the
10 defendant Head did knowingly aid and abet another in the
11 commission of the crime charged in the count which you
12 are considering, you should return a verdict of guilty on
13 that count.

14 You are instructed that the question of
15 possible punishment of the defendant in the event of a
16 conviction is no concern of yours, and it should not in
17 any sense enter into or influence your deliberation.
18 The duty of imposing sentence in the event of a conviction
19 rests exclusively upon the Court.

20 Your function is to weigh the evidence in the
21 case and determine the guilt or innocence of the
22 defendant solely upon the basis of that evidence.

23 When you retire to the jury room, treat one
24 another with consideration and respect, as I know you will.
25 If differences of opinion arise, your discussion should be

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2 dignified, calm, intelligent.

3 Your verdict must be based on the evidence
4 and the law: the evidence which was presented in this
5 case as you remember it, and the law as I have given it
6 to you in these instructions.

7 You are each entitled to your own opinion.
8 No juror should acquiesce in a verdict against his or her
9 individual judgment. Nevertheless, I will point out that
10 no one should enter a jury room with such pride of opinion
11 that he or she would refuse to change his or her mind if
12 convinced by intelligent argument on the part of another
13 juror or jurors. Discussion and deliberation are part
14 of our democratic jury process, and you should approach
15 your task in that spirit. Talk out your differences.

16 Each of you should, in effect, decide the case
17 for himself or herself after thoroughly reviewing the
18 evidence and discussing it frankly with your fellow jurors,
19 with an open mind and with a desire to reach a verdict.
20 If you do that, you will be acting in the true democratic
21 process of the American jury system.

22 There are twelve of you on this jury. I will
23 excuse the remaining alternate before you retire for
24 your deliberations, with the thanks of the Court.

25 Any verdict must be the unanimous verdict of

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2 all of you and it must represent the honest conclusion
3 of each of you.

4 I submit the case to you with every confidence
5 that you will fully measure up to the oath which you took
6 as members of this jury, to decide the issues submitted
7 to you fairly and impartially and without fear or favor.

8 Now, members of the jury, if you find that the
9 Government has failed to establish the guilt of this
10 defendant beyond a reasonable doubt, you should acquit him.
11 If you find that he has not violated the law, you should
12 not hesitate, for any reason whatever to render a verdict
13 of not guilty.

14 But, on the other hand, if you find that the
15 Government has established the guilt of this defendant
16 beyond a reasonable doubt, you should not hesitate,
17 because of sympathy or any other reason, to render a
18 verdict of guilty.

19 Your forelady then will return an oral verdict
20 in open court of guilty or not guilty on count 1; guilty
21 or not guilty on count 4; guilty or not guilty on count 5.

22 Are there any exceptions, gentlemen? If so,
23 I will hear you at the side bar.

24 MR. PERL: No exceptions, your Honor.

25 MR. VIRELLA: The Government hasn't any

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2 exceptions, your Honor.

3 (Deputy marshal sworn.)

4 THE CLERK: Miss Edelhertz, you are excused.
5 Please report down to Room 109.

6 THE COURT: Thank you for your service,
7 Miss Edelhertz. "They also serve who only stand and wait."

8 (Alternate Juror No. 2 discharged.)

9 THE COURT: All right.

10 (At 2:45 p.m., the jury left the courtroom to
11 commence deliberations.)

12 THE COURT: Would you all please remain where
13 we can reach you if the jury sends in any note. If you
14 go anywhere else in the building, make sure the clerk
15 has your telephone number.

16 I suggest you don't go anywhere else, if you
17 can avoid it, because the elevators here are slow.

18 MR. VIRELLA: I will stay in the courtroom,
19 your Honor.

20 THE COURT: So get your exhibits ready. Agree
21 on what they are. We don't want any rhubarb about that.

22 I am going to be in Courtroom 102. I am
23 hearing fifteen or twenty motions. If you want me, I
24 will be over there.

25 (Recess)

SENTENCING MINUTES BEFORE MAC MAHON U.S.D.J.
ON MAY 24, 1976

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UNITED STATES OF AMERICA

v.

76 Cr. 295

DONALD HEAD

Before: HON. LLOYD F. MacMAHON, District Judge.

New York, New York - May 24, 1976, 9:30 a.m.

For the Government: FEDERICO E. VIRELLA, Esq.

For the Defendant: IRVING PERL, Esq.

- - -

THE CLERK: United States of America v.
Donald Head, for sentence.

Is the Government ready?

MR. VIRELLA: Government is ready.

MR. PERL: Defendant is ready.

THE COURT: We have some open matters.

First, the Court is handing the reporter a
copy of the Court's opinion on a motion to suppress,
which includes its findings and conclusions.

(The opinion of the Court was copied into

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the record, as follows:

"United States v. Head - 76 Cr. 295 - LFM

"Opinion

"Defendant Head moves to suppress and exclude from introduction into evidence a package containing \$26,800 in currency, taken from his possession in the office of his commanding officer, Captain Robert Roberts, USAF, in Don Muang Air Base, Thailand, and all testimony relating to its seizure and contents.

"It appears from an evidentiary hearing, held May 3, 1976, that agents of the Drug Enforcement Administration ('DEA') and the Office of Special Investigations ('OSI') learned of facts indicating that a member of the United States Air Force, stationed at the postal facilities at the American Air Terminal, Don Muang Air Base, Thailand, was engaged in trafficking in narcotics between Thailand and the United States through the mail.

"On March 9, 1976, Special Agent Kerr of the OSI contacted Captain Roberts, commanding officer of the postal facility at Don Muang, and relayed certain information about the suspect in order to identify the individual involved. Captain Roberts concluded that the defendant Head matched the description, name,

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and address supplied by Kerr.

"Captain Roberts learned on March 9 or March 10 that a registered package, addressed to Head, had arrived at the postal facility. Captain Roberts caused this package to be fluoroscoped and observed on the screen that it appeared to contain stacks of currency. Two assistants also viewed the fluoroscope screen and concurred with Captain Roberts' conclusion. Captain Roberts then contacted Special Agent Kerr.

:Early in the morning of March 11, 1976, Special Agent Maher of DEA learned that a complaint and arrest warrant against Head had been issued by a United States Magistrate for the Southern District of New York.

"At approximately 11:00 a.m. on March 11, 1976, Captain Roberts caused a telephone call to be made to defendant Head's home, which was in downtown Bangkok, to instruct Head to come to the air base in order to complete his processing for transfer back to the United States as his 'hitch' in Thailand was soon to end. At about 3:00 o'clock that afternoon, Head, accompanied by his daughter, reported to Captain Roberts' office at the air base. Captain Roberts directed Head to complete his processing, to pick up his mail, and then

1 rdmch Head 648

2 to return to the office. Head left the office and
3 returned a short time later.

4 "Head was then placed under arrest by two
5 Air Force Security Police, who took a blue vinyl shoulder
6 bag from him, in the presence of Captain Roberts and
7 Agents Kerr and Maher. At that time, Head's daughter
8 began to cry, and Head asked Agent Maher to open the
9 shoulder bag and take out a bottle of milk to pacify
10 the child. Maher then discovered the unopened package
11 in the bag. Soon thereafter, Head was taken from the air
12 base to the OSI office in Bangkok with the unopened
13 package.

14 "A telephone call was made by Special Agent
15 Oak of the OSI at Agent Kerr's request to obtain
16 authorization to open and search the package. At
17 approximately 5:00 p.m., Agent Kerr was informed that
18 a search of the package had been authorized by Colonel
19 Howard F. O'Neal, Commanding Officer of the 635th Combat
20 Support Group at Utapao Air Base. The package was then
21 opened and the contents -- \$26,800 in United States
22 currency -- was found.

23 "Defendant Head moves to suppress the package,
24 the \$26,800 contained in it, and all testimony relating
25 to its seizure on the grounds that fluoroscoping the

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1 package, and/or seizing and opening the package subsequent
2 to his arrest, were illegal and in violation of the Fourth
3 Amendment. The motion is denied.
4

5 "The Fourth Amendment applies to matter moving
6 through the mail. Ex parte Jackson, 96 U.S. 727 (1877).
7 However, that amendment only proscribes searches and seizures
8 which are 'unreasonable.' We find that neither the
9 fluoroscopy of the package nor its opening after Head's
10 arrest were unreasonable searches.

11 "The air mail terminal where the package was
12 received and fluoroscoped was directed and managed by
13 the Air Force under the authority of Title 39, United States
14 Code, Section 406, which states that the Postal Service
15 may establish branch offices on defense installations
16 (Sec. 406(a)) and that these branches may be manned by
17 Armed Services or other personnel (Sec. 406(b)).

18 "The Air Force, in implementing this authority,
19 has issued a comprehensive manual entitled 'Postal
20 Service -- Responsibilities and Procedures (January 28,
21 1973).' Section 14-3 of that manual covers 'Examination
22 of Personal Mail.'

23 "Subsection (c) of Section 14-3 provides:

24 "' Fluoroscope and other detection equipment
25 will be used by military postal personnel as directed

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by the military department which operates the military post office.'

"And subsection (i) of Section 14-3 provides in part:

"'Merchandise mailed as personal mail from military post offices into the customs territory of the United States is subject to customs examination.'

"The air mail terminal at Don Muang is a clearing house for all incoming and outgoing mail for United States military and government personnel assigned to Thailand. The package addressed to defendant Head had been sent from Washington, D.C. Thus, the package had crossed international boundaries and was fluoroscoped shortly after its arrival in Thailand.

"The courts have frequently underlined the distinction between searches conducted within the boundaries of the United States and those occurring at a port of entry. See *Carroll v. United States*, 267 U.S. 132, 151-152 (1925). It has been held that searches by customs officials need not be supported by a search warrant or based upon probable cause. *United States v. Ortega*, 471 F.2d 1350, 1360 (2d Cir. 1972); *United States v. Glaziou*, 402 F.2d 812 (2d Cir. 1968), cert. denied, 393 U.S. 1121 (1969).

"Indeed, in this area, the only restriction

"Under the facts of this case, the fluoroscopic inspection of the package was eminently reasonable, because the only purpose of the limited intrusion involved was to detect contraband and not to violate the 'sanctity' of any personal

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correspondence.

"In addition, we deal here with a United States military installation, far from our own shores, in a country where the presence of our military is a tense political issue. Under all of these circumstances, we cannot say that the fluoroscope examination was an unreasonable search.

"There is another ground for sustaining the fluoroscope examination of the package. The Air Force, mindful that its mail facilities present a facile means for transporting contraband, has established an anticontraband program designed to deter those using the mails from trafficking in illegal commodities. A variety of regulations have been promulgated to implement this program. These regulations prohibit the opening of first, or higher, class mail, but expressly require a fluoroscope examination.

"The regulations also require that the existence of this program be widely advertised among military personnel, and that the fluoroscope machine be placed where it is likely to be seen by as many individuals as possible. The obvious purpose of these regulations is to deter anyone from using the Air Force mails to ship contraband in the first place.

1
2 "It is well settled that the Fourth Amendment
3 applies to 'zones of privacy,' that is, areas in which
4 an individual has a reasonable expectation that
5 governmental forces will not intrude. Katz v. United
6 States, 389 U.S. 347 (1967).

7 "In the present case, defendant Head, who
8 worked at the air mail terminal as a supervisor, must
9 have been aware of the anticontraband program and the
10 use of the fluoroscope. He must then have been aware
11 that any package mailed to him was subject to such an
12 examination.

13 "This is similar to United States v. Hall,
14 488 F.2d 193 (9th Cir. 1973), where the Court held
15 that the defendant, who made incriminating statements,
16 although he had reason to know that his conversations
17 over his automobile radio-telephone were subject to
18 interception, could not complain that these statements
19 were in fact overheard since he did not justifiably rely
20 upon his privacy.

21 "In addition, the use of the fluoroscope in
22 this case may be analogized to the use of a magnetometer
23 at an airport through which passengers must walk prior
24 to boarding an airplane. In United States v. Albarado,
25 495 F.2d 799 (2d Cir. 1974), the Second Circuit upheld the

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1 use of magnetometers, not on the basis of implied consent,
2 but because the search involved is reasonable under
3 the circumstances. The Court pointed out that the safety
4 factor in preventing skyjackings was important and that
5 the limited intrusion involved did not result in any
6 indignity or social stigma to the individual who activates
7 the machine, since a small amount of metal is sufficient.
8 Balancing the interests involved, the Court upheld the
9 use of such devices. Compare United States v. Bronstein,
10 521 F.2d 459 (2d Cir. 1975).
11

12 "In the present case, such a balancing of
13 interests mandates that we uphold the fluoroscope
14 examination of the package. The international trafficking
15 in drugs presents serious dangers to all our citizenry,
16 a danger just as real as that presented to airline passengers
17 that their plane could be skyjacked. The privacy of an
18 individual's correspondence was not violated here. The
19 fluoroscope reveals only an outline of the contents of
20 the package. Actual words cannot be read. As with the
21 magnetometer, the search is extremely limited and
22 commensurate with the performance of its justifiable
23 function. See United States v. Albarado, supra,
24 495 F.2d at 806.

25 "We conclude, therefore, that the fluoroscoping

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1 of the package did not violate defendant Head's Fourth
2 Amendment rights.
3

4 "We also find that the seizure and opening
5 of the package subsequent to Head's arrest was valid.

6 "Article 36 of the Uniform Code of Military
7 Justice, Title 10, United States Code, Section 836(a),
8 explicitly authorizes the President to prescribe rules
9 concerning the procedures to be used in military criminal
10 matters. The Manual for Courts-Martial of the United
11 States was promulgated by President Nixon in 1969 under
12 this authorization. Chapter 152 of the Manual provides
13 that a search may be authorized by a commanding officer
14 upon a showing of probable cause in certain situations,
15 including A search of property owned, used, or occupied
16 by, or in the possession of, a person subject to military
17 law ... to property being situated in a military
18 installation, encampment, or vessel or some other place
19 under military control or situated in occupied territory
20 or a foreign country.' Defendant Head has not contended
21 that the authorization was issued without probable cause.

22 "The issuance of authorization to seize by
23 the commanding officer in this case was thus entirely
24 proper. Indeed, such a procedure was in the factual
25 context of this case totally necessary, since recourse to

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a federal magistrate or state judge, as required by Rule 41 of the Federal Rules of Criminal Procedure, was a logistical impossibility.

"Colonel O'Neal was the commanding officer to whom the postal personnel at Don Muang had turned previously for search authorizations. In this case, he acted as a detached, impartial magistrate, a role which Captain Roberts, Head's immediate supervisor, might not have been able to fill. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

"Furthermore, the fact that no written affidavit was made by Special Agent Oak or another agent, and that the Commanding Officer's authorization was not reduced to writing until after the search are irrelevant. The courts construing the authorization procedure have concluded that neither a written application nor a written authorization is necessary. *Wallis v. O'Kier*, 491 F.2d 1323 (10th Cir.), cert. denied, 419 U.S. 901 (1974); *United States v. Doyle*, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); *United States v. Florence*, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952).

"In addition, we conclude that this search occurred as an incident to Head's lawful arrest and, therefore, must be upheld. See *United States v. Lam Muk Chiu*.

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522 F.2d 330 (2d Cir. 1975); United States ex rel. Muhammed v. Mancusi, 432 F.2d 1046 (2d Cir. 1970); United States v. Edmonds, Docket No. 75-1323 (2d Cir., May 7, 1976).

"Accordingly, defendant Head's motion to suppress a package, \$26,800 in currency contained in the package, and all testimony relating to its seizure and contents is denied in all respects.")

We have the matter of pending contempt of defense counsel. After thinking it over, the Court has decided it would take more out of the Court than it would do good to the defense counsel, and I haven't got time to be writing certificates of contempt. So we will go no further with that.

MR. PERL: Thank you, your Honor.

THE COURT: We will now proceed with the sentence of Mr. Head.

MR. VIRELLA: Your Honor, prior to beginning, there is one housekeeping matter. We have marked as an exhibit No. 3590, which is a list of the 3500 material that was given over to Mr. Perl during the trial. Mr. Perl has had the list and we would just like to mark it as part of the record.

THE COURT: All right. Received as part of

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2 the record.

3 MR. PERL: No objection.

4 MR. VIRELLA: Your Honor, the Government has
5 a statement to make with respect to sentencing.

6 It is a very rare occasion when this Court,
7 your Honor, has before it an active serviceman, serving
8 with the United States Air Force overseas, who has
9 engaged in an international conspiracy to send to these
10 cities in the United States large amounts of heroin.

11 Mr. Head, your Honor, has been serving with
12 the Air Force in Thailand for the last two years, and
13 during that period of time he was serving as a postal
14 clerk.

15 The proof, your Honor, though it was a very
16 limited period of time, showed that vast amounts of heroin
17 were sent from Thailand to the United States. Your
18 Honor is very well aware of what the proof was, so I
19 will not go into that. We would respectfully request,
20 your Honor, that this case is one in which deterrence could
21 serve a very important lesson, not only to servicemen
22 who are continuing to engage in heroin traffic, the
23 men overseas who are considering whether or not they will
24 engage in sending heroin and other drugs to the cities
25 of the United States.

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1 Mr. Head was at the pivotal and central part
2 of this conspiracy, your Honor. Our office has requested
3 cooperation from him and the office is also prepared
4 to grant immunity, but that offer has been rejected by
5 Mr. Head.
6

7 Consequently, the other members of this
8 conspiracy remain unknown as well as the other sources
9 of heroin in Thailand remain unknown.

10 In conclusion, your Honor, we would respectfully
11 request that the Court take into consideration the total
12 scope of this conspiracy and the role that Mr. Head has
13 played.

14 THE COURT: All right, I will hear defense
15 counsel.

16 MR. PERL: Your Honor, you have a full report
17 in front of you, which I have looked at.

18 With all due respect, Mr. Head was tried and
19 found guilty. In numerous conversations I have had with
20 him, he steadfastly maintains his innocence, that he did
21 not have any active role in this conspiracy and, therefore,
22 there was nothing he could cooperate in the way of giving
23 the Government any further information, as he had none.

24 However, there has been a trial in this matter
25 and your Honor sat through it and you are aware of what

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transpired.

The one thing that is missing from the probation report, I have been advised by Mr. Head prior to even seeing it, and I realize it may seem a bit strained under the circumstances, but Mr. Head was due to be presented with a medal of commendation for his work in the service during these seven years.

As your Honor is aware, Mr. Head does not have any prior encounters with the law, and I would only ask the Court to take into consideration Mr. Head's statement that he is not at all -- he has not been involved in any conspiracy, and there is nothing he could give the Government.

I would ask your Honor to be guided accordingly.

THE COURT: Mr. Head, do you have anything to say in your own behalf before I pronounce sentence?

THE DEFENDANT: I just tried to help the District Attorney as much as I could. I just told them what I knew.

THE COURT: Mr. Head, you're a liar. The evidence against you was overwhelming, overwhelming, that you were the central figure in a massive conspiracy, an international conspiracy to deal in enormous quantities of heroin; that is plain beyond a shadow of a doubt. Your

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1
2 guilt was clear.

3 As far as I am concerned, the penalty provided
4 by law is too little in your case. The harm you do to
5 other human beings, the lives people like you ruin and
6 destroy, no punishment man can mete out to you would be
7 adequate or sufficient.

8 Accordingly, the Court sentences you to
9 15 years and 3 years special parole on each of counts 1,
10 4 and 5, the sentences are to run concurrently with each
11 other.

12 I want to warn you that you have a right to
13 appeal this conviction; that if you wish to appeal it you
14 must file a notice of appeal with the clerk of the court
15 within ten days. If you have no funds to hire a lawyer,
16 the Court will appoint one free of charge.

17 Do you understand that?

18 THE DEFENDANT: Yes, sir.

19 - - -
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25

OPINION ON MOTION TO SUPPRESS
(Filed April 28, 1976)

UNITED STATES v. HEAD - 76 Cr. 295-LFM

OPINION

DEFENDANT HEAD MOVES TO SUPPRESS AND EXCLUDE FROM INTRODUCTION INTO EVIDENCE A PACKAGE CONTAINING \$26,800 IN CURRENCY TAKEN FROM HIS POSSESSION IN THE OFFICE OF HIS COMMANDING OFFICER, CAPTAIN ROBERT ROBERTS, USAF, IN DON MUANG AIR BASE, THAILAND, AND ALL TESTIMONY RELATING TO ITS SEIZURE AND CONTENTS.

IT APPEARS FROM AN EVIDENTIARY HEARING, HELD MAY 3, 1976, THAT AGENTS OF THE DRUG ENFORCEMENT ADMINISTRATION ("DEA") AND THE OFFICE OF SPECIAL INVESTIGATIONS ("OSI") LEARNED OF FACTS INDICATING THAT A MEMBER OF THE UNITED STATES AIR FORCE, STATIONED AT THE POSTAL FACILITIES AT THE AMERICAN AIR TERMINAL, DON MUANG AIR BASE, THAILAND, WAS ENGAGED IN TRAFFICKING

IN NARCOTICS BETWEEN THAILAND AND THE UNITED STATES
THROUGH THE MAIL.

ON MARCH 9, 1976, SPECIAL AGENT KERR OF THE
OSI CONTACTED CAPTAIN ROBERTS, COMMANDING OFFICER OF
THE POSTAL FACILITY AT DON MUANG, AND RELAYED CERTAIN
INFORMATION ABOUT THE SUSPECT IN ORDER TO IDENTIFY
THE INDIVIDUAL INVOLVED. [REDACTED]

AND ~~THE~~ CAPTAIN ROBERTS CON-
CLUDED THAT THE DEFENDANT HEAD MATCHED THE ~~PERSON~~
~~PERSON~~, DESCRIPTION, NAME, AND ADDRESS SUPPLIED BY KERR.

~~XXXXXXXXXX~~ CAPTAIN ROBERTS' ~~ATTENTION~~ ^{LEARNED} ON
REGISTERED
MARCH 9 OR MARCH 10 THAT A PACKAGE, ADDRESSED TO
HEAD, HAD ARRIVED AT THE POSTAL FACILITY. CAPTAIN
ROBERTS CAUSED THIS PACKAGE TO BE FLUOROSCOPED AND
OBSERVED ON THE ~~SCREEN~~ ^{SCREEN} THAT IT APPEARED TO CONTAIN

STACKS OF CURRENCY. TWO ASSISTANTS ALSO VIEWED THE FLUOROSCOPE SCREEN AND CONCURRED WITH CAPTAIN ROBERTS' CONCLUSION. CAPTAIN ROBERTS THEN CONTACTED SPECIAL AGENT KERR.

EARLY IN THE MORNING OF MARCH 11, 1976, SPECIAL AGENT MAHER OF DEA LEARNED THAT A COMPLAINT AND ARREST WARRANT AGAINST HEAD HAD BEEN ISSUED BY A UNITED STATES MAGISTRATE FOR THE SOUTHERN DISTRICT OF NEW YORK.

AT APPROXIMATELY 11:00 A.M. ON MARCH 11, 1976, CAPTAIN ROBERTS CAUSED A TELEPHONE CALL TO BE MADE TO DEFENDANT HEAD'S HOME, WHICH WAS IN DOWNTOWN BANGKOK, TO INSTRUCT HEAD TO COME TO THE AIR BASE IN ORDER TO COMPLETE HIS PROCESSING FOR TRANSFER BACK TO THE UNITED STATES AS HIS "HITCH" IN THAILAND WAS

SOON TO END. AT ABOUT 3:00 O'CLOCK THAT AFTERNOON, HEAD, ACCOMPANIED BY HIS DAUGHTER, REPORTED TO CAPTAIN ROBERTS' OFFICE AT THE AIR BASE. CAPTAIN ROBERTS DIRECTED HEAD TO COMPLETE HIS PROCESSING, TO PICK UP HIS MAIL, AND THEN TO RETURN TO THE OFFICE. HEAD LEFT THE OFFICE AND RETURNED A SHORT TIME LATER.

HEAD WAS THEN PLACED UNDER ARREST BY TWO AIR FORCE SECURITY POLICE, WHO TOOK A BLUE VINYL SHOULDER BAG FROM HIM, IN THE PRESENCE OF CAPTAIN ROBERTS AND AGENTS KERR AND MAHER. AT THAT TIME, HEAD'S DAUGHTER BEGAN TO CRY, AND HEAD ASKED AGENT MAHER TO OPEN THE SHOULDER BAG AND TAKE OUT A BOTTLE OF MILK TO PACIFY THE CHILD. MAHER THEN DISCOVERED THE UNOPENED PACKAGE IN THE BAG. SOON THEREAFTER, HEAD WAS TAKEN FROM THE AIR BASE TO THE OSI OFFICE

IN BANGKOK WITH THE UNOPENED PACKAGE.

A TELEPHONE CALL WAS MADE BY SPECIAL AGENT OAK
AT AGENT KERR'S REQUEST
~~OF THE~~ OF THE OSI, TO OBTAIN AUTHORIZATION TO OPEN AND
 SEARCH THE PACKAGE. AT APPROXIMATELY 5:00 P.M.,
 AGENT KERR WAS INFORMED THAT A SEARCH OF THE PACKAGE
 HAD BEEN AUTHORIZED BY COLONEL HOWARD F. O'NEAL, COM-
 MANDING OFFICER OF THE 635TH COMBAT SUPPORT GROUP AT
 UTAPAO AIR BASE. THE PACKAGE WAS THEN OPENED AND
 THE CONTENTS -- \$26,800 IN UNITED STATES CURRENCY --
 WAS FOUND.

DEFENDANT HEAD MOVES TO SUPPRESS THE PACK-
 AGE, THE \$26,800 CONTAINED IN IT, AND ALL TESTIMONY
 RELATING TO ITS SEIZURE ON THE GROUNDS THAT ~~HE~~
~~ON~~ ~~THE~~ FLUOROSCOPING ~~THE~~ THE PACKAGE, AND ^{for} ITS
^{seizing} ~~the~~ ^{the package} AND OPENING, SUBSEQUENT TO HIS ARREST, WERE

ILLEGAL AND IN VIOLATION OF THE FOURTH AMENDMENT. THE MOTION IS DENIED.

THE FOURTH AMENDMENT APPLIES TO MATTER MOVING THROUGH THE MAIL. EX PARTE JACKSON, 96 U.S. 727 (1877). HOWEVER, THAT AMENDMENT ONLY PROSCRIBES SEARCHES AND SEIZURES WHICH ARE "UNREASONABLE." ~~THE~~ ^{next} ~~WE FIND THAT THE FLUOROSCOPING OF THE PACKAGE, WAS IN AN~~ ^{AND ITS OPENING AFTER HIS ARREST WERE} UNREASONABLE SEARCHES.

THE AIR MAIL TERMINAL WHERE THE PACKAGE WAS RECEIVED AND FLUOROSCOPED WAS DIRECTED AND MANAGED BY THE AIR FORCE UNDER THE AUTHORITY OF TITLE 39, UNITED STATES CODE, SECTION 406, WHICH STATES THAT THE POSTAL SERVICE MAY ESTABLISH BRANCH OFFICES ON DEFENSE INSTALLATIONS (SEC. 406(A)) AND THAT THESE BRANCHES MAY BE MANNED BY ARMED SERVICES OR OTHER PERSONNEL (SEC. 406(B)).

THE AIR FORCE, IN IMPLEMENTING THIS AUTHORITY, HAS ISSUED A COMPREHENSIVE MANUAL ENTITLED "POSTAL SERVICE -- RESPONSIBILITIES AND PROCEDURES (JANUARY 28, 1973)." SECTION 14-3 OF THAT MANUAL COVERS "EXAMINATION OF PERSONAL MAIL."

SUBSECTION (c) OF SECTION 14-3 PROVIDES:

"FLUOROSCOPE AND OTHER DETECTION EQUIPMENT WILL BE USED BY MILITARY POSTAL PERSONNEL AS DIRECTED BY THE MILITARY DEPARTMENT WHICH OPERATES THE MILITARY POST OFFICE."

AND SUBSECTION (i) OF SECTION 14-3 PROVIDES IN PART:

"MERCHANDISE MAILED AS PERSONAL MAIL FROM MILITARY POST OFFICES INTO THE CUSTOMS TERRITORY OF THE

UNITED STATES IS SUBJECT TO CUSTOMS
EXAMINATION."

THE AIR MAIL TERMINAL AT DON MUANG IS A CLEAR-
ING HOUSE FOR ALL INCOMING AND OUTGOING MAIL FOR UNITED
STATES MILITARY AND GOVERNMENT PERSONNEL ASSIGNED TO
THAILAND. THE PACKAGE ADDRESSED TO DEFENDANT HEAD HAD
BEEN SENT FROM WASHINGTON, D.C. THUS, THE PACKAGE
HAD CROSSED INTERNATIONAL BOUNDARIES AND WAS FLUORO-
SCOPED SHORTLY AFTER ITS ARRIVAL IN THAILAND.

THE COURTS HAVE FREQUENTLY UNDERLINED THE
DISTINCTION BETWEEN SEARCHES CONDUCTED WITHIN THE
BOUNDARIES OF THE UNITED STATES AND THOSE OCCURRING
AT A PORT OF ENTRY. SEE CARROLL V. UNITED STATES,
267 U.S. 132, 151-152 (1925). IT HAS BEEN HELD THAT
SEARCHES BY CUSTOMS OFFICIALS NEED NOT BE SUPPORTED

BY A ^{SEARCH} ~~SEARCH~~ WARRANT OR BASED UPON PROBABLE CAUSE. UNITED STATES V. ORTEGA, 471 F.2d 1350, 1360 (2d Cir. 1972); UNITED STATES V. GLAZIOU, 402 F.2d 812 (2d Cir. 1968), CERT. DENIED, 393 U.S. 1121 (1969).

INDEED, IN THIS AREA, THE ONLY RESTRICTION WHICH THE FOURTH AMENDMENT SUPERIMPOSES IS THAT THE SEARCH IS REASONABLE UNDER THE CIRCUMSTANCES. THE RATIONALE OF THE DISTINCTION BETWEEN INTERNAL AND INTERNATIONAL SEARCHES IS THAT THE PURPOSE OF THE LATTER IS NOT TO APPREHEND PERSONS, BUT TO PREVENT THE INTRODUCTION OR EXPORTATION OF CONTRABAND. CARROLL V. UNITED STATES, SUPRA.

IT HAS BEEN HELD THAT CUSTOMS INSPECTION OF INTERNATIONAL MAIL AT A POST OFFICE IS PERMISSIBLE BECAUSE THE POST OFFICE IS CONSIDERED A PORT OF ENTRY

111a

IN THAT CIRCUMSTANCE. SEE UNITED STATES V. SWEDE,
326 F. SUPP. 533 (S.D.N.Y. 1971); UNITED STATES V.
SOHNEN, 298 F. SUPP. 51 (E.D.N.Y. 1969). AND IN
PEOPLE V. KASOFF, 110 CAL. RPTR. 391 (CT.APPS.,
2d DIST. ~~1973~~ 1973), THE COURT HELD THAT PACKAGES,
SENT BY MILITARY PERSONNEL IN SOUTHEAST ASIA TO THE
UNITED STATES THROUGH MILITARY POST OFFICES, ARE NOT EXEMPT
FROM CUSTOMS SEARCHES. NO GREATER RIGHTS CAN EXIST
MERELY BECAUSE A PACKAGE TRAVELS THE OPPOSITE ROUTE;
THAT IS, WHEN IT IS MAILED FROM THE UNITED STATES TO
A MILITARY POST OFFICE OVERSEAS.

~~CONFIDENTIAL~~
~~CONFIDENTIAL~~
~~CONFIDENTIAL~~

UNDER THE FACTS OF THIS CASE, THE FLUORO-

SCOPING OF THE PACKAGE WAS EMINENTLY REASONABLE.

of THE LIMITED INTRUSION INVOLVED, ^{because} ~~THE~~ ONLY PURPOSE

WAS TO DETECT CONTRABAND AND NOT TO VIOLATE THE

"SANCTITY" OF ANY PERSONAL CORRESPONDENCE.

~~CONFIDENTIAL~~ IN ADDITION, WE ~~ARE~~ HERE ^{Deal}

~~CONFIDENTIAL~~ WITH A UNITED STATES MILITARY INSTALLA-

TION, FAR FROM OUR OWN SHORES, IN A COUNTRY WHERE

THE PRESENCE OF OUR MILITARY IS A TENSE POLITICAL

ISSUE. UNDER ALL OF THESE CIRCUMSTANCES, WE CANNOT

SAY THAT THE FLUOROSCOPE EXAMINATION WAS AN UNREASON-

ABLE SEARCH.

THERE IS ANOTHER GROUND FOR SUSTAINING THE
 FLUOROSCOPE EXAMINATION OF THE PACKAGE. THE AIR
 FORCE, MINDFUL THAT ITS MAIL FACILITIES PRESENT A
 FACILE MEANS ^{for transporting} ~~TRANSPORTING~~ CONTRABAND, HAS ESTABLISHED
 AN ANTICONTRABAND PROGRAM, ^{designed} ~~DESIGNED~~ TO ^{DETECT} ~~DETECT~~
 THOSE USING THE MAILS FROM TRAFFICKING IN ILLEGAL
 COMMODITIES. A VARIETY OF REGULATIONS HAVE BEEN
 PROMULGATED TO IMPLEMENT THIS PROGRAM. THESE REGU-
 LATIONS ^{prohibit the opening of} ~~PROHIBIT THAT FOR~~ FIRST CLASS, ^{or} ~~or~~ HIGHER,
 CLASS, ^{but expressly require} ~~MAIL, WHICH IS NOT OPENED,~~ A FLUORO-
 SCOPE EXAMINATION, ~~WHICH IS NOT OPENED,~~

THE REGULATIONS ALSO ^{require} ~~PROHIBIT~~ THAT THE EX-
 ISTENCE OF THIS PROGRAM ~~SHOULD~~ BE WIDELY ADVERTISED
 AMONG MILITARY PERSONNEL, AND THAT THE FLUOROSCOPE
 MACHINE BE PLACED WHERE IT IS LIKELY TO BE SEEN BY

AS MANY INDIVIDUALS AS POSSIBLE. THE OBVIOUS PURPOSE OF THESE REGULATIONS IS TO DETER ANYONE FROM USING THE AIR FORCE MAIL TO SHIP CONTRABAND IN THE FIRST PLACE.

IT IS WELL SETTLED THAT THE FOURTH AMENDMENT APPLIES TO "ZONES OF PRIVACY," THAT IS, AREAS IN WHICH AN INDIVIDUAL HAS A REASONABLE EXPECTATION THAT GOVERNMENTAL FORCES WILL NOT INTRUDE. KATZ V. UNITED STATES, 389 U.S. 347 (1967).

IN THE PRESENT CASE, DEFENDANT HEAD, WHO WORKED AT THE AIR MAIL TERMINAL AS A SUPERVISOR, MUST HAVE BEEN AWARE OF THE ANTICONTRABAND PROGRAM AND THE USE OF THE FLUOROSCOPE. HE MUST THEN HAVE BEEN AWARE THAT ANY PACKAGE MAILED TO HIM WAS SUBJECT TO SUCH AN EXAMINATION.

THIS IS SIMILAR TO UNITED STATES V. HALL,

488 F.2d 193 (9TH CIR. 1973), WHERE THE COURT HELD

THAT THE DEFENDANT, WHO MADE INCRIMINATING STATE-

MENTS, ALTHOUGH HE HAD REASON TO KNOW THAT HIS ~~WORDS~~ ^{CONVERSATIONS}

OVER HIS AUTOMOBILE RADIO-TELEPHONE WERE SUBJECT TO INTERCEPTION ~~THAT THESE STATEMENTS WERE IN FACT OVERHEARD~~, COULD NOT COM-

PLAIN THAT THESE STATEMENTS WERE IN FACT OVERHEARD

SINCE HE DID NOT JUSTIFIABLY RELY UPON HIS PRIVACY.

*IN ADDITION, THE USE OF THE FLUOROSCOPE IN THIS CASE
MAY BE ANALOGIZED TO ~~THE USE OF A~~ THE USE OF A*

MAGNETOMETER AT AN AIRPORT THROUGH WHICH PASSENGERS

MUST WALK PRIOR TO BOARDING AN AIRPLANE. IN UNITED

STATES V. ALBARADO, 495 F.2d 799 (2d CIR. 1974), THE

SECOND CIRCUIT UPHELD THE USE OF MAGNETOMETERS, NOT

ON THE BASIS OF IMPLIED CONSENT, BUT BECAUSE THE

SEARCH INVOLVED IS REASONABLE UNDER THE CIRCUMSTANCES.

THE COURT POINTED OUT THAT THE SAFETY FACTOR IN PRE-

VENTING SKYJACKINGS WAS IMPORTANT AND THAT THE LIMITED

INTRUSION INVOLVED DID NOT RESULT IN ANY INDIGNITY OR SOCIAL STIGMA TO THE INDIVIDUAL WHO ACTIVATES THE MACHINE, SINCE A SMALL AMOUNT OF METAL IS SUFFICIENT. BALANCING THE INTERESTS INVOLVED, THE COURT UPHELD THE USE OF SUCH DEVICES. COMPARE UNITED STATES V. BRONSTEIN, 521 F.2d 459 (2d Cir. 1975).

IN THE PRESENT CASE, SUCH A BALANCING OF INTERESTS MANDATES THAT WE UPHOLD THE FLUOROSCOPE EXAMINATION OF THE PACKAGE. THE INTERNATIONAL TRAFFICKING IN DRUGS PRESENTS SERIOUS DANGERS TO ALL OUR CITIZENRY, A DANGER JUST AS REAL AS THAT PRESENTED TO AIRLINE PASSENGERS THAT THEIR PLANE COULD BE SKYJACKED. ~~THE~~ ^{privacy} ~~SEARCH~~ ^{on individuals} OF ~~THE~~ CORRESPONDENCE ~~SEARCHED~~ ^{WAS} NOT VIOLATED HERE. THE FLUOROSCOPE ~~SEARCH~~

reveals as to an
~~THE ACTUAL WORDS~~ OUTLINES OF THE CONTENTS *of*
the package.
 THE ACTUAL WORDS ~~CANNOT BE READ.~~

AS ~~THE~~ WITH THE MAGNETOMETER, THE SEARCH IS EXTREMELY LIMITED AND COMMENSURATE WITH THE PERFORMANCE OF ITS JUSTIFIABLE FUNCTION. SEE UNITED STATES V. ALBARADO, SUPRA, 495 F.2D AT 806.

WE CONCLUDE, THEREFORE, THAT THE FLUOROSCOPING OF THE PACKAGE DID NOT VIOLATE DEFENDANT HEAD'S FOURTH AMENDMENT RIGHTS.

WE ALSO FIND THAT THE SEIZURE AND OPENING OF THE PACKAGE SUBSEQUENT TO HEAD'S ARREST WAS VALID.

ARTICLE 36 OF THE UNIFORM CODE OF MILITARY JUSTICE, TITLE 10, UNITED STATES CODE, SECTION 836(A)), EXPLICITLY AUTHORIZES THE PRESIDENT TO PRESCRIBE RULES CONCERNING THE PROCEDURES TO BE USED IN MILITARY

CRIMINAL MATTERS. THE MANUAL FOR COURTS-MARTIAL OF THE UNITED STATES WAS PROMULGATED BY PRESIDENT NIXON IN 1969 UNDER THIS AUTHORIZATION. CHAPTER 152 OF THE MANUAL PROVIDES THAT A SEARCH MAY BE AUTHORIZED BY A COMMANDING OFFICER UPON A SHOWING OF PROBABLE CAUSE IN CERTAIN SITUATIONS, INCLUDING "A SEARCH OF PROPERTY OWNED, USED, OR OCCUPIED BY, OR IN THE POSSESSION OF, A PERSON SUBJECT TO MILITARY LAW . . . TO PROPERTY BEING SITUATED IN A MILITARY INSTALLATION, ENCAMPMENT, OR VESSEL OR SOME OTHER PLACE UNDER MILITARY CONTROL OR SITUATED IN OCCUPIED TERRITORY OR A FOREIGN COUNTRY." DEFENDANT HEAD HAS NOT CONTENDED THAT THE AUTHORIZATION WAS ISSUED WITHOUT PROBABLE CAUSE.

THE ISSUANCE OF AUTHORIZATION TO SEIZE BY THE COMMANDING OFFICER IN THIS CASE WAS THUS ENTIRELY

PROPER. INDEED, SUCH A PROCEDURE WAS IN THE FACTUAL CONTEXT OF THIS CASE TOTALLY NECESSARY, SINCE RECOURSE TO A FEDERAL MAGISTRATE OR STATE JUDGE, AS REQUIRED BY RULE 41 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE, WAS A LOGISTICAL IMPOSSIBILITY.

COLONEL O'NEAL WAS THE COMMANDING OFFICER TO WHOM THE POSTAL PERSONNEL AT DON MUANG HAD TURNED PREVIOUSLY FOR SEARCH AUTHORIZATIONS. IN THIS CASE, HE ACTED AS A DETACHED, IMPARTIAL MAGISTRATE, A ROLE WHICH CAPTAIN ROBERTS, ^{HEAD'S IMMEDIATE SUPERVISOR} MIGHT NOT HAVE BEEN ABLE TO FILL. COOLIDGE V. NEW HAMPSHIRE, 403 U.S. 443 (1971).

FURTHERMORE, THE FACT THAT NO WRITTEN AFFIDAVIT WAS MADE BY SPECIAL AGENT OAK OR ANOTHER AGENT, AND THAT THE COMMANDING OFFICER'S AUTHORIZATION WAS NOT REDUCED TO WRITING UNTIL AFTER THE

SEARCH ARE IRRELEVANT. THE COURTS CONSTRUING THE AUTHORIZATION PROCEDURE HAVE CONCLUDED THAT NEITHER A WRITTEN APPLICATION NOR A WRITTEN AUTHORIZATION IS NECESSARY. WALLIS v. O'KIER, 491 F.2d 1323 (10TH CIR.), CERT. DENIED, 419 U.S. 901 (1974); UNITED STATES v. DOYLE, 1 U.S.C.M.A. 545, 4 C.M.R. 137 (1952); UNITED STATES v. FLORENCE, 1 U.S.C.M.A. 620, 5 C.M.R. 48 (1952).

IN ADDITION, WE CONCLUDE THAT THIS SEARCH OCCURRED AS AN INCIDENT TO HEAD'S LAWFUL ARREST AND, THEREFORE, MUST BE UPHELD. SEE UNITED STATES v. LAM MUK CHIU, 522 F.2d 330 (2D CIR. 1975); UNITED STATES EX REL. MUHAMMED v. MANCUSI, 432 F.2d 1046 (2D CIR. 1970). UNITED STATES v. EDMONDS, DOCKET NO. 75-1323 (2D CIR., MAY 7, 1976)

ACCORDINGLY, DEFENDANT HEAD'S MOTION TO
SUPPRESS A PACKAGE, \$26,800 IN CURRENCY CONTAINED
IN THE PACKAGE, AND ALL TESTIMONY RELATING TO ITS
SEIZURE AND CONTENTS IS DENIED IN ALL RESPECTS.

AFM 182-1 23 January 1973

14-1

Chapter 14

PROCEDURES FOR CUSTOMS EXAMINATION OF OFFICIAL AND PERSONAL MAIL

14-1. Customs Examination. This chapter, implements procedures as prescribed by DOD Regulation 5030.49R for the customs examination by military postal personnel of official and personal mail addressed to civilian and official addresses in the customs territory of the United States or to another APO FPO and mailed at a military post office outside such territory.

14-2. Examination of Official Mail:

a. Heads of DOD component activities at all levels are responsible for insuring that matter mailed under official indicia is free of contraband.

b. Commanders at all levels will review their procedures to insure that stringent controls are implemented to prevent the use of official mail for the mailing of contraband.

c. Military postal personnel will conduct random examination of official matter presented for entry into the mail as official mail to insure no contraband is contained therein. Particular attention will be given to official mail addressed to civilian addresses and to individuals by name at official addresses.

d. Official mail will be accepted at military post offices solely from individuals recognized as authorized agents or unit mail clerks of an organization or activity. Mail other than ordinary letters entered into a military post office by other channels will be returned to the origin activity or organization for verification of its authenticity.

e. Mail which upon examination is found to contain contraband will be turned over to the appropriate investigative agency.

f. Official mail being transmitted between military post offices and the United States under the indicia requires no customs declarations forms or additional indorsements. Official matter mailed with postage affixed,

as distinguished from the indicia, will not bear customs declaration forms but will be indorsed "Contents for Official Use—Exempt from Customs Requirements."

g. All official mail entered into the military postal system by authorized non-DOD agencies and suspected of containing contraband will be forwarded under an indicia label to the appropriate Bureau of Customs activity in the United States for examination.

14-3. Examination of Personal Mail:

a. Military postal clerks will identify the mailer by checking his identification card and insure that a legible and complete return address is entered on each parcel. Mailers utilizing military postal facilities will sign parcels below the return address at the time of mailing.

b. Military postal clerks will insure that a person mailing parcels for another individual places his name, grade, social security number, and signature below the return address of the actual sender. This information will be verified by checking the identification card of the person mailing the parcel.

c. Fluoroscope and other detection equipment will be used by military postal personnel as directed by the military department which operates the military post office.

d. Dogs, specifically trained for the detection of narcotics, will be used at mail terminals and other postal facilities as directed by the appropriate military commander.

e. All first-class letter and parcel mail suspected of containing contraband will be forwarded under an indicia label to the appropriate Bureau of Customs activity in the United States for examination.

f. All second, third and fourth class mail suspected of containing contraband will be examined by military postal authorities. In

addition, these types of mail may be referred to Customs Inspectors (Excepted) for examination if such customs inspectors are available. Such mail found to contain contraband will be reported to appropriate military investigative agencies for action.

g. Voice tape cassettes and film mailers entering the customs territory of the United States will be pouched and labeled to the appropriate Bureau of Customs activity in the United States for inspection.

h. All parcel mail will be routed to Bureau of Customs facilities at ports of entry as mail supposed liable to customs inspection or duty.

i. Commanders at all levels will establish continuing information programs to discour-

age and deter mailing of narcotics, drugs and other contraband and will review their procedures to insure that effective controls are implemented to prevent the use of personal mail for the mailing of all forms of contraband.

j. Merchandise mailed as personal mail from military post offices into the customs territory of the United States is subject to customs examination. Customs duty and/or revenue tax (hereinafter referred to simply as duty) may be imposed unless duty-free entry is provided by law. Compliance with customs laws is the responsibility of the individual mailer; however, military postal personnel will insure that properly completed required customs declaration forms are attached to mail matter presented for mailing.

BY ORDER OF THE SECRETARY OF THE AIR FORCE

OFFICIAL

JOHN D. RYAN, *General, USAF*
Chief of Staff

DWIGHT W. COVELL, *Colonel, USAF*
Director of Administration

Summary of Revised, Deleted, or Added Material

✓ This revision requires non USAFPCS activities dispatching mail to submit DD Form 878 to HQ USAFPCS/TP (para 1-5); establishes the qualification of postal personnel (para 1-8); defines the duties of postal clerks (para 1-9); prescribes requirements for use of free mail (table 1-1); clarifies support provided by commanders to postal activities (table 2-1); deletes responsibilities and duties of postal officers (para 3-1); prohibits misuse of military postal privileges (para 5-5); clarifies use of postal service center lock boxes (para 6-4); prescribes the use of PS Label 55 and POD Form 3849 (paras 8-2a and 8-4c); revises testing procedures for unit mail clerks (para 8-6b); prescribes the use of AF Forms 624 and 610 (para 8-14 and 8-34); and in general updates terms and definitions.

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,
Appellee,

- against -

DONALD HEAD, a/k/a "MR. DON",
Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK

ss.:

I, **James A. Steele,** being duly sworn,
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the **5th** day of **August** 19**76** at **One St. Andrews Plaza, New York, New York**

deponent served the annexed *app - dy* upon

Robert B. Flake Jr.

the **Attorney** in this action by delivering a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the herein,

Sworn to before me, this **5th**
day of **August** 19**76**

Robert T. Brin

James A. Steele
JAMES A. STEELE

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977